

Missouri Attorney General's Opinions - 1950

Opinion	Date	Topic	Summary
1-50	Feb 20	Taxation.	Income tax – Personal exemptions of non-resident taxpayers shall be allowable in the same amount as for resident taxpayers. Rule promulgated by state administrative agency contrary to statute is void. Senate Bill 152 to become effective April 14, 1950, enacted by 65th General Assembly, provides personal exemptions of non-residents subject to income tax shall be prorated on basis that the gross income in Missouri bears to the gross income of non-residents for all sources for the year.
1-50	May 1	TAXATION.	Bank Tax Act of 1946, Income representing the payment of interest for which the liability to pay had become fixed and absolute before the commencement of the taxable period would not be subject to the tax imposed by this act.
1-50	July 31	Hon. Charles M. Abbett	WITHDRAWN
1-50	Sept 5	MOTOR VEHICLES. PROOF OF FINANCIAL RESPONSIBILITY.	Proof of financial responsibility to be given only by judgment debtor whose driver's license was suspended; when.
1-50	Oct 13	DEPARTMENT OF REVENUE. INCOME TAX REGULATION.	Federal estate taxes are deductible on the State income tax return of the Estate paying said taxes. Gift taxes are deductible on a State income tax return by the taxpayer who pays such tax.
1-50	Oct 18	INCOME TAX. LIMITATION OF ACTION.	Under Laws of Mo., 1949, page 611, section 11363, enlarging the period of limitation during which an assessment of state income tax could be made from three to four years, the four year period becomes applicable to those taxpayers who were subject to an assessment under the three year limitation at the effective date of the amendment on April 14, 1950, but this enlargement of the period of limitation does not revive the possibility of an assessment which has been barred under the three year limitation before the section was amended.
2-50	Feb 3	PUBLIC BUILDINGS. CONTRACTS.	State is liable only to general contractor and not to sub-contractors under construction contracts.
2-50	Feb 16	PENITENTIARY. HOURS OF LABOR. WATCHMEN.	Watchmen employed by Industrial Department of Missouri State Penitentiary not within provisions of Section 9039, R. S. Mo. 1939, setting maximum daily and weekly hours of work.
2-50	Mar 1	PUBLIC BUILDINGS.	Law relating to fixtures.

2-50	May 15	PUBLIC BUILDINGS. UNIVERSITY.	In the construction and repair of public buildings Missouri products must be used if obtainable at reasonable market prices. Discretionary with officers awarding the contract.
3-50	Mar 14	SCHOOLS.	Board of Directors of six director school district not authorized to determine right of duly elected director to his new office.
3-50	Sept 26	HIGHWAYS.	Right of way for county highway subject to easement for electric lines and electric company. Must be compensated for removing lines from right of way.
5-50	Jan 23	TAXATION.	Intangible personal property. Interest accruing before January 1, 1945, and paid in 1947 and 1948 cannot be included in annual yield for latter years for intangible personal property tax assessments.
5-50	Mar 14	Hon. Emmett L. Bartram	WITHDRAWN
5-50	Mar 22	SALES TAX.	Director of Revenue shall not issue a certificate of title for any new or used motor vehicle subject to sales tax until the tax levied for the sale of the same has been paid.
5-50	Mar 27	ELECTIONS. REFERENDUM.	A referred act becomes effective on the date of its approval by the vote of the people.
5-50	Apr 1	MOTOR CARRIERS. PUBLIC SERVICE COMMISSION.	(1) The word "route" as used in statutes relating to motor vehicles denotes the distance and direction of travel and direction of travel of the motor carrier from one point to another and does not therefore denote the entire operating authority of the said motor carrier. (2) Motor carrier cannot separate its operating authority into various segments without the consent and permission of the Public Service Commission. (3) Provision relating to a motor carrier "operating a route in this state, the total mileage of which is not greater than twenty miles" would apply only to intrastate operations.
5-50	Aug 29	BRIDGES. DAMAGES TO PUBLIC HIGHWAYS OR BRIDGES.	Any person who shall willfully or negligently damage a highway or bridge upon a public highway is liable for the amount of such damage and the same may be recovered in the name of the state by the municipality, county or other civil subdivision of the state suffering the loss.
7-50	Mar 3	MAGISTRATE COURTS. SCHOOLS.	County superintendent of schools as school attendance officer may file complaint in magistrate court to enforce compulsory school attendance of children; magistrate court has jurisdiction to hear such cases arising out of prosecution for failure to comply with school attendance law.
10-50	Jan 11	TAXATION. EXEMPTIONS.	Tillable land owned by a church and farmed by members thereof not exempt from taxation even though proceeds therefrom are used for paying operating costs of church.

10-50	Feb 18	ELECTIONS. BOARD OF ELECTION COMMISSIONERS, KANSAS CITY, MISSOURI.	Board of Election Commissioners of city of 300,000 to 700,000 may consolidate two or more precincts, dispense with clerk's canvass and the printing of registration lists for special referendum election April 4, 1950.
10-50	Feb 20	ELECTIONS. BOARD OF ELECTION COMMISSIONERS, KANSAS CITY, MISSOURI. REFERENDUM ELECTION.	Kansas City Election Board has right and duty to conduct special referendum election in that part of Clay County purportedly annexed to Kansas City.
10-50	June 8	OPTOMETRY.	An optometrist is forbidden by law to advertise directly or indirectly prices or terms for optometric services.
10-50	July 26	SCHOOLS. ATTORNEY AND CLIENT.	School board may contract for services of attorney, with attorney fee to be paid on percentage basis.
10-50	Aug 30	DIVORCE. RECORDER. MARRIAGE.	Consent of mother having custody of minor under divorce proceeding necessary for issuance of marriage license. Father's consent insufficient.
10-50	Sept 8	Hon. A. B. Bolinger	WITHDRAWN
11-50	Mar 9	MOTOR VEHICLES. CRIMINAL LAW.	Failure to deliver certificate of title upon sale of motor vehicle misdemeanor punishable by fine and jail sentence.
11-50	Apr 14	CRIMINAL LAW. GAMBLING.	Pinball machine which pays off in free games only is not a gambling device.
11-50	Sept 27	SCHOOL BUSES.	Any motor vehicle operated for the purpose of transporting school children shall be required to comply with Laws of Missouri, 1949, p. 329, requiring the vehicle be marked with the specified lettering and equipped with a signaling device.
12-50	Feb 20	ROADS AND BRIDGES.	County Court has no authority to advance money to Special Road District organized under Article 11, Chapter 46, R. S. Missouri, 1939, for construction of a bridge.
12-50	Feb 23	SHERIFFS. ELECTIONS.	Sheriff of third class county may appoint deputies to assist him in election duties. Sheriff fixes and is liable for payment of compensation to such deputies and is not entitled to be reimbursed for compensation paid deputies by county.
12-50	Apr 11	COUNTY COURTS. ROADS.	County Court has no authority to close a public road to permit strip mining, in a county under township organization.

12-50	Apr 15	Hon. William F. Brown	WITHDRAWN
12-50	Apr 27	SCHOOLS. TAXATION.	Property of school districts annexed to a consolidated district subject to taxation to discharge pre-existing bonded indebtedness of consolidated district.
12-50	May 19	Mr. Herbert S. Brown	WITHDRAWN
12-50	June 6	COUNTY BUDGET LAW.	County Clerk cannot countermand orders of County Court in budget matters.
12-50	Dec 27	EASEMENT. TITLE BY PRESCRIPTION. VESTED IN PETTIS COUNTY.	Easement in real estate may not be acquired by adverse possession but may be acquired by prescription by continuous subjection of servient estate to uses for which the easement is intended for a period in excess of ten years. The unorganized public cannot obtain fishing rights by prescription. Right to take fish resides in owner of land occupied by water, except in cases where land and water are owned by different persons, then right exists in the owner of the water.
13-50	Jan 13	TAXATION SALES.	Sales by wholesale to purchaser not coded and paying Sales Tax should be considered sale at retail and burden is upon seller to show otherwise.
13-50	Mar 23	Hon. Donald W. Bunker	WITHDRAWN
13-50	Apr 11	SALES TAX.	Sale by Missouri dealer to Missouri purchaser, of property shipped to dealer from foreign manufacturer for delivery to purchaser subject to Sales Tax.
13-50	Apr 11	TAXATION – SALES. SALES TAX.	Persons engaged in business who do not have resale certificates with respect to certain transactions may offer evidence that such sales were not sales at retail.
13-50	Apr 24	TAXATION – SALES. SALES TAX.	Failure to obtain resale certificates upon sales to peddlers creates no absolute liability for sales tax; failure to have such certificates merely constitutes prima facie evidence that such are retail sales.
13-50	May 9	Hon. W. H. Burke	WITHDRAWN
13-50	June 12	SALES TAX. TAXATION – SALES.	Sales by Missouri buyers to Missouri sellers, goods shipped from without the State, are intrastate sales and not exempt from the Missouri Sales Tax Act.
13-50	Nov 3	Mr. C. B. Burns	WITHDRAWN
14-50	Apr 14	Miss Ruth Calhoun	WITHDRAWN
14-50	July 17	ELECTIONS.	Voter may vote only on charter proposition when submitted at primary election, not required to vote political ballot.

15-50	Apr 10	COUNTY HOSPITALS. LIABILITY OF COUNTY.	Neither the county nor the board of trustees of a county hospital are liable for the torts committed by its staff or employees, and are not liable for property damage or injuries received by reason of the negligent maintenance of the hospital building or the premises adjacent thereto.
15-50	June 20	REGISTRATION OF VOTERS.	For the purpose of registration of voters, the 1950 decennial census becomes effective January 1, 1951.
15-50	Aug 10	PUBLIC BUILDINGS. CORRECTIONS, DEPARTMENT OF. LEGISLATION. REVISION LAWS.	Revision of all statutes bearing on the same subject-matter do not affect construction. Department of Corrections subject to provisions of Act setting forth the duties and responsibilities of the Director of Public Buildings.
15-50	Sept 7	WELFARE, DIVISION OF.	Division of Welfare may receive federal grant for needy disabled persons.
15-50	Nov 13	BONDS. DIVISION OF WELFARE.	No statutory authority for any employee of Division of Welfare except director to execute surety bonds.
16-50	Mar 31	TAXATION.	Sales tax not applicable to sales to Army Officers' and Noncommissioned Officers' Clubs.
17-50	Jan 6	STATE PURCHASING AGENT.	State Purchasing Agent must purchase all State printing.
17-50	Feb 4	ASSESSORS. COUNTY COURTS.	Counties of third class may not pay for compensation of deputy assessors or clerks.
17-50	Apr 19	Mr. Leo J. Clavin	WITHDRAWN
17-50	Dec 7	INHERITANCE TAX. CONVEYANCES.	A conveyance of real estate without an adequate and full consideration by which the grantor or transferor retains or secures a life estate with remainder in fee simple to the children of the grantor is taxable upon his death as property subject to the Missouri inheritance tax.
18-50	Jan 10	ELECTIONS.	Four Judges and two Clerks are to be present at each Precinct in the City of St. Louis at special election to be held April 4, 1950.
18-50	Feb 7	MAGISTRATE COURT.	The summons of jurors in the magistrate court may be signed by either the judge of the magistrate court or the clerk of the magistrate court.
18-50	Feb 27	ELECTIONS.	Judges and clerks of special referendum election in Kansas City are to be paid half by Kansas City and half by Jackson and Clay counties.
18-50	Mar 15	ELECTIONS.	Contract of Board of Election Commissioners of Kansas City extending beyond term of office of members entering into such contract not

			invalid merely because of such fact.
18-50	Apr 4	TAXATION.	Personal property may not be taxed to merchant for both merchants' tax and personal property tax.
18-50	Apr 6	JURIES. PROBATE COURTS.	Jurors in Probate Courts entitled to receive \$1.00 per day for their services.
18-50	May 25	ELECTIONS.	Declaration of candidate which does not state office for which filing is made is insufficient and does not authorize printing of candidate's name on ballot.
18-50	June 27	SPECIAL ROAD DISTRICTS.	A special road district organized under the provisions of Article XI, Section 8711 R.S.A. Mo. 1939 cannot extend its boundaries there being no statutory provision therefor.
18-50	July 6	ELECTIONS. PETITIONS.	Petitions for amendment of city charter of Kansas City should be verified by Board of Election Commissioners and certified to city council.
18-50	Aug 10	SHERIFF.	Sheriff is to convey county patient found insane to state hospital upon order of probate court. Rate of compensation fixed by R. S. Mo. 1939, Sec. 9355. No duty to convey pay patient admitted to state hospital through application to superintendent unless the sheriff has the patient in his care and custody for some other cause.
18-50	Nov 22	LOTTERY.	Such an enterprise contains three elements: consideration, chance and prize, and, therefore, is a lottery.
18-50	Dec 14	OFFICERS.	Payment to incumbent county judge who holds over under action brought by himself in circuit court relieves county of liability for further payment after Supreme Court holds incumbent not entitled to office.
19-50	Feb 2	FINES.	Fines in Seagram Anti-Trust Case go into general revenue.
19-50	July 24	Hon. Bart Cooper	WITHDRAWN
20-50	Sept 25	AGRICULTURE. RENDERING PLANTS. LICENSES.	Persons starting operation of disposal plant and operating vehicles in connection therewith must pay full amount of license for calendar year.
22-50	June 9	SCHOOLS. PROSECUTING ATTORNEYS.	Prosecuting attorney may exercise discretionary powers in instituting civil actions in which county is concerned.
22-50	July 17	INSANE PERSONS. PROBATE COURTS.	Lapse of time preventing operation of Section 9356, the Probate Court of County in which party regularly discharged from state hospital takes up residence has proper jurisdiction to commit said party as insane poor person to state hospital.
22-50	Nov 9	COUNTY PUBLIC	Title to real estate purchased for the use of a county public health

		HEALTH CENTERS. TITLE TO REAL ESTATE.	center should be vested in the county for the use and benefit of the county health center or council or its successors.
24-50	Jan 16	SPECIAL ROAD DISTRICT.	Method of election of commissioners to be determined by Board of Commissioners.
24-50	Feb 13	ROADS DISTRICT, SPECIAL.	Costs of election to disorganize special road district organized under Chap. 46, Art. 10, must be borne by County in which all or greater part of district is located.
24-50	Mar 2	ROAD DISTRICTS, SPECIAL.	Special Road District, organized under Article 11, Chapter 46, Revised Statutes of Missouri, 1939 must bear costs of proceedings to dissolve such district. If County Court decides against dissolution, costs must be borne by petitioning landowners.
24-50	Mar 9	DEPUTY CIRCUIT CLERKS IN FOURTH CLASS COUNTIES.	Deputy circuit clerks and assistants may be appointed by circuit clerk with approval of circuit court and salary paid out of county treasury.
24-50	Mar 9	PRELIMINARY HEARING.	Transcript of testimony at preliminary hearing need not be delivered to defendant when defendant is released on bond. Transcript of testimony is to be delivered to clerk of the court in which the offense if cognizable.
24-50	May 1	CHILDREN.	A child born in wedlock is presumed to be legitimate; the father of an illegitimate child can be made to support such child.
24-50	June 21	ROADS.	Board of Commissioners of Special Road District organized under Article 10, Chapter 46 R. S. Mo. 1939, shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village, therein to construct, improve and repair such highways, and this control shall include all streets dedicated to the public use which may lie in an unincorporated community within the special road district.
24-50	Nov 21	LIQUOR. INTOXICATING LIQUOR.	Obstruction of 1/3 to 1/2 of windows of tavern by curtains constitutes no violation of Liquor Control Act.
24-50	Dec 18	SCHOOLS. WARRANTS.	Warrant issued by school district to pay indebtedness exceeding revenue for particular year is void; warrant cannot be issued in subsequent year to pay previous warrant issued.
25-50	Jan 11	COUNTY TREASURERS. SCHOOL DISTRICTS.	Dual capacity of county treasurer and treasurer of six-director school district is prohibited by public policy and violates the rule against holding incompatible offices.
25-50	Mar 31	Hon. Ralph H.	WITHDRAWN

		Duggins	
25-50	July 20	THE STATE BOARD OF CHIROPRACTIC EXAMINERS.	The State Board of Chiropractic Examiners of Missouri does not have the power to subpoena witnesses.
25-50	Aug 29	OFFICERS.	Calling of County Collector, who is a member of the reserve, to active duty, does not cause vacancy in office.
25-50	Sept 19	DIVISION OF INDUSTRIAL INSPECTION.	To be subject to pay an inspection fee a business must fall within one of the classes enumerated by Missouri law as being subject to inspection.
25-50	Nov 15	Doctor S. J. Durham	WITHDRAWN
26-50	Jan 18	ELECTIONS.	Kansas City Board of Election Commissioners not required to have clerks canvass for special election for referendum on gasoline tax increase.
26-50	Mar 31	SALARIES.	Salary of County Clerk elected at November 1950 election is determined by 1950 decennial census.
26-50	Aug 4	President Roy Ellis	WITHDRAWN
26-50	Nov 15	Hon. J. R. Eiser	WITHDRAWN
27-50	Jan 16	TAXATION AND REVENUE.	Omitted tangible personal property may be added to Assessment rolls by County Board of Equalization or State Tax Commission for current year.
27-50	Jan 31	Hon. Clarence Evans	WITHDRAWN
27-50	Mar 21	FRANCHISE TAX. BANKS.	New York Mutual Savings Bank pays Twenty-five Dollar (\$25.00) annual fee.
27-50	Apr 1	TAXATION.	State Tax Commission does not assess pipe line which is not a public utility.
27-50	Aug 24	RAILROADS. TAX ASSESSMENT.	Real property operated as parking lot by the Terminal Railroad Association of St. Louis is "locally assessable."
27-50	Sept 20	TAXATION. HATCHERY.	Hatchery operator engaged in selling baby fowls should be classified as a merchant and subject to the merchant's tax. Farmer engaged in selling farm products not subject to merchant's tax provided he does not have a regular stand or place of business away from his farm. Person contracting to hatch eggs for others is not a merchant.
27-50	Nov 21	TAXATION. STATE TAX COMMISSION.	A taxpayer may appeal from the assessment of a county assessor to the County Board of Equalization and from their decision to the State Tax Commission. A taxpayer has no right of appeal from the assessment of county assessor directly to the State Tax Commission.

30-50	Feb 9	ELECTIONS. OFFICERS.	Person appointed during Senate recess to fill vacancy on Kansas City Election Commission caused by resignation entitled to pay.
30-50	May 8	GRAND JURY. PROSECUTING ATTORNEY.	Jackson County Prosecuting Attorney may not receive funds from county in addition to those provided in contingent fund statute, Section 13470, R. S. Missouri, 1939. County court may not appropriate money to grand jury for investigation.
31-50	Mar 7	ELECTIONS.	Under provisions of Section 11682 judges selected by county court, clerks selected by judges.
31-50	Apr 6	CORONER.	Governor to appoint eligible person to fill vacancy in office of coroner in fourth class county. Such officer to hold office for the remainder of the term. The next election for county coroner will be at the general election in 1952.
31-50	Apr 19	COUNTY TREASURER.	Salary in counties of the fourth class under township organization determined according to statute fixing salary of treasurers in fourth class counties generally.
31-50	May 16	TOWNS AND VILLAGES. TAXATION.	Delinquent taxes of any town or village shall be collected by the county collector in the same manner as delinquent state and county taxes are collected.
31-50	June 13	OFFICERS.	County Treasurer's compensation may not be increased during term of office.
32-50	Mar 31	COUNTY.	Third and fourth class counties may issue negotiable "tax anticipation notes" to borrow money on anticipated tax collections.
32-50	May 26	DIVISION OF HEALTH. PRIVILEGED COMMUNICATIONS.	A regulation of the Division of Health requiring privileged communications to be held confidential.
33-50	Feb 7	WORKMEN'S COMPENSATION. OFFICERS.	The election by a county may be made by the County Court. Such acceptance does not cover elective officers.
33-50	Feb 10	INHERITANCE TAX.	Inheritance tax should be determined and assessed in accordance with terms of will, rather than on basis of disposition provided by assignment of part of legatee's interest to others.
33-50	Mar 17	INHERITANCE TAX.	Damages received under wrongful death statutes not subject to Inheritance Tax.
33-50	May 3	INSANE PERSONS.	Insane persons are entitled to an adjudication of their mental capacity by the Probate Court to determine the necessity of appointing a guardian even when they have been acquitted of a criminal charge by reason of insanity.
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33-50	June 26	CIRCUIT COURTS. SALARIES AND FEES.	Circuit Judge of the Second Judicial Circuit entitled to receive the change of venue fees in cases which were tried and finally disposed of by said judge prior to July 1, 1946.
33-50	July 13	SCHOOLS. TOWNSHIP TRUSTEES.	Township trustee has no authority to disburse school funds of his township after formation of consolidated district under provisions of Section 1, Laws of 1947, Vol. II, Page 317; must turn over all such funds in his hands to treasurer of enlarged district, and is not entitled to a commission for such turnover.
33-50	Aug 15	INHERITANCE TAX.	Deferred payment of inheritance tax under law prior to Laws of 1921, page 110, bears interest at rate of six per cent per annum from death of decedent until payment of tax. Inheritance tax supervisor may not compromise claim for such interest.
33-50	Sept 8	INHERITANCE TAX.	Supervisor may not accept compromise offer for interest on tax. Interest must be abated by probate court.
33-50	Nov 10	STATE INHERITANCE TAXES.	Inheritance tax to be paid by life tenant and not contingent remainderman, when.
33-50	Nov 22	COUNTY COURT. COUNTY TREASURER. SERVICES.	The county court in a third class county is not authorized to pay extra compensation to the county treasurer for duties performed pursuant to the disbursement of county road funds under the King Road Bill (Laws of Mo. 1945, p. 1471.)
35-50	Feb 18	ARMORIES. ADJUTANT GENERAL.	Purchase of armory for which money was appropriated to Adjutant General to be made by State Purchasing Agent.
35-50	Feb 24	STATE BOARD OF CHIROPRACTIC EXAMINERS.	State Board of Chiropractic Examiners not authorized to pay investigator from operating fund of said Board.
35-50	May 5	LOCATION AND ESTABLISHMENT OF ROADS.	The county court is the proper forum for the commencement of a proceeding for the location and establishment of a county public road.
35-50	Aug 24	TAXATION. LOCAL ASSESSMENTS.	Property of state not subject to local assessment by city of third class for paving of street.
35-50	Oct 23	ADJUTANT GENERAL. APPROPRIATIONS. MUNICIPALITIES.	Since third class city has no authority to levy assessment against state-owned armory for paving a street, Adjutant General cannot pay or contribute a proportionate part of the cost of same.
36-50	Jan 16	PROBATE COURTS.	A probate court of a fourth class county has no jurisdiction and authority over the case and cannot commit an indigent nervous person who is not insane to a state hospital for treatment.
36-50	June 9	PROBATE JUDGE.	A probate judge may not collect fees for hearing and determining inheritance tax matters. Probate judges no longer have the power to

			solemnize marriages.
37-50	Jan 20	EXPERT WITNESSES.	A prosecuting attorney in a third class county operating under the county budget law may include in his estimated budget of expenditures an item for the payment to proposed expert witnesses for work necessary to be done by them before testifying on behalf of the state in criminal cases.
37-50	Feb 20	MOTOR VEHICLE TRAILERS.	The type of hitch or length thereof does not determine whether a vehicle should be registered and licensed as a trailer.
37-50	Mar 11	FOOD AND DRUG. SOFT DRINKS.	Natural fruit juices are not included in the definition of soft drinks and are not subject to the Beverage Inspection Act.
37-50	Apr 11	VITAL STATISTICS. BIRTH REGISTRATION.	A child generated by the first husband of the mother should be registered as the child of said natural father even though the mother divorces said husband and marries husband No. 2 before the birth of said child.
37-50	May 8	FOOD AND DRUGS. SEIZURE OF FOOD.	Food seized by the Bureau of Food and Drugs cannot be held for more than three days without a court order.
37-50	May 9	Hon. Buford Hamilton, M.D.	WITHDRAWN
37-50	May 17	COUNTY CLERK.	Compensating of deputy fixed by county clerk.
37-50	May 22	ADJUTANT GENERAL. MILITIA.	Cannot enter into agreement in which State would be liable for torts of Air National Guard personnel.
37-50	June 8	DIVISION OF HEALTH. FOOD AND DRUG.	Suggested forms of pleading to condemn unsound or contaminated food in accordance with provisions of Section 9861, R. S. Mo. 1939, Reenacted Laws 1943, page 559.
37-50	June 12	Dr. Buford G. Hamilton	WITHDRAWN
37-50	July 19	Hon. Lane Harlan	WITHDRAWN
37-50	Oct 10	Col. David E. Harrison	WITHDRAWN
37-50	Oct 20	ELECTIONS. NAME APPEARING ON BALLOT.	Candidate nominated by use of primary ballot stating the first two initials and the last name may appear on the general election ballot by a first initial, middle name and last name if, in judgment of official whose duty it is to print the ballot, said first initial, middle name and last name sufficiently identifies him.
37-50	Oct 27	HIGHWAY PATROL. MOTOR VEHICLES.	Highway Patrol may approve plexiglas as safety glass.
37-50	Nov 30	CRIMINAL LAW.	Any person, except a manufacturer or wholesaler of weapons to or

		WEAPONS, CONCEALED.	from a wholesale or retail dealer therein, capable of being concealed upon the person, shall, before selling, lending, or delivering such weapon to another, first receive from such person a permit issued by the Circuit Clerk of the County in which such person resides authorizing such person to receive such weapon.
38-50	Feb 9	DIVISION OF HEALTH. DRUGS AND DRUGGISTS.	Any person who sells, delivers, or offers for sale any new drug that has not been tested and approved as safe for use by either the Federal Food and Drug Administration or the Division of Health of Missouri shall be guilty of a misdemeanor.
38-50	Feb 10	DIVISION OF HEALTH. PLUMBING CODE.	The Division of Health may require the Code of Regulations prepared by the Board of Plumbing and Sewer Inspection of St. Louis County to provide regulations that will protect the public health and safety.
38-50	Mar 29	DIVISION OF HEALTH. FUNDS. VITAL STATISTICS.	All funds received by the Division of Health must be deposited in the state treasury.
38-50	Mar 31	DIVISION OF HEALTH. REPORT AND ORDER.	The attached report and order in regard to hearing held in Eldon, Missouri on March 21, 1950, by the Director of Public Health and Welfare and the Director of Division of Public Health is hereby approved as to form and legal content.
38-50	Apr 6	Dr. Buford G. Hamilton	WITHDRAWN
39-50	Jan 3	LIQUOR CONTROL. AIRPORTS.	Liquor by drinks license cannot be issued for premises on airport constructed by city outside its corporate limits.
39-50	Apr 21	DISPLAY OF LIQUOR LICENSE.	A wholesale liquor dealer who does not display his license on the premises described in his license is in violation of the Rules and Regulations of the Supervisor of the Department of Liquor Control.
39-50	June 22	Hon. Covell R. Hewitt	WITHDRAWN
39-50	Dec 6	MAGISTRATES.	Salaries of Magistrates for terms beginning January 1, 1951, determined by assessed valuation for Year 1949.
40-50	Jan 28	ELECTIONS.	A county may conduct a special election for distribution of school funds on the same date, and with the same officials as are employed in the forthcoming gasoline tax referendum.
40-50	Feb 10	Hon. Roger Hibbard	WITHDRAWN
40-50	Feb 23	TAXATION.	Estate of decedent not liable for taxes on property devised for charitable use, where lien had not accrued at death.
40-50	Mar 13	COUNTY TREASURER.	County Court in third class county, not under township organization,

			may pay stenographic help for County Treasurer.
40-50	Apr 12	NEWSPAPERS. PUBLICATIONS.	Section 14966, Senate Bill No. 123, 65th General Assembly, has not fixed maximum to be charged by newspapers for legal publications in civil cases nor does any other statute set maximum, outside cities having 100,000 population of more.
40-50	June 27	Hon. Wilson D. Hill	WITHDRAWN
40-50	Nov 30	MAGISTRATES.	Where population of county falls below 30,000 according to preliminary census figures, separate office of magistrate abolished as of January 1, 1951. No districting in such county for purpose of election on appointment of additional magistrate.
40-50	Nov 30	CONTRACT. STATUTE OF FRAUDS.	Contract for the sale of Goods, Wares and Merchandise for the price of \$30.00 or more, not valid unless the parties thereto comply with the provision of the Statute of Frauds, (Sec. 3355 R. S. Mo. 1939)
41-50	Jan 6	Hon. W. H. Holmes	WITHDRAWN
41-50	Apr 25	COUNTY COLLECTORS.	Current drainage taxes included in determining compensation for mailing notice of taxes due.
41-50	May 16	SCHOOLS. TAXATION.	Levy applicable when election approving excess is declared void is maximum permitted under constitution without election. Taxpayers who tender legal tax not liable for penalty.
41-50	June 28	SCHOOLS. ELECTIONS.	Notice of special election in common school district entitled "special school meeting" instead of "special school election," and concluding election within one hour after opening of special school meeting, are mere irregularities and will not justify the State Auditor in refusing to register bonds voted at such election under Section 3306, R. S. Missouri, 1939.
41-50	July 7	PROSECUTING ATTORNEYS.	Prosecuting attorneys of third class counties to receive that compensation provided by Sections 12939, 9701 and H. B. #297 as payment in full; not entitled to any part of fees collected.
41-50	Sept 21	SCHOOLS.	Notice of bond election specifying purpose of bond issue to be purchase and removal of war surplus buildings and re-erection on school premises as sufficient.
41-50	Sept 27	COUNTY COLLECTOR. COUNTY CLERK.	Under Senate Bill No. 1024 and House Bill No. 2010, 65th General Assembly, County Collector receives ten cents per tract for making delinquent land list and County Clerk receives ten cents per tract for making back tax book, plus five cents per tract for authenticating list.
41-50	Dec 15	COUNTY CLERKS.	County clerks of third and fourth class counties entitled to retain fees for extending the tax books for 1947 and 1948.

42-50	Nov 16	DEEDS OF TRUST. MORTGAGES. NEWSPAPERS.	Newspaper notice for the foreclosure of a deed of trust on property lying within that part of Kansas City located in Clay County must be made in newspapers published in Kansas City and Clay County.
44-50	Feb 15	PROSECUTING ATTORNEYS. ELECTIONS.	Candidate for office of prosecuting attorney not required to be licensed attorney to be eligible for nomination. County Clerk must receive said candidate's declaration and place his name on the ballot.
44-50	Mar 10	PUBLIC RECORDS. DIVISION OF INDUSTRIAL INSPECTION.	Individual statistical reports filed with Division of Industrial Inspection are public records subject to inspection by those parties showing an interest therein. Inspection reports made by Division not subject to inspection.
44-50	Apr 19	TAXATION. SALES FOR DELINQUENT TAXES.	Surplus from general tax sale of lands after payment of delinquent taxes, interest, penalty and costs should be paid to owner of lands at time of tax sale and not to grantee of deed from such owner subsequent to such tax sale where deed purports to convey grantor's interest in said lands and no reference is made to right to surplus.
45-50	Jan 24	LIQUOR LICENSE.	One who obtains license which permits intoxicating liquor to be consumed on his premises is subject to pay fee fixed by county court within limits fixed by law, and may be prosecuted for failure to do so.
45-50	Mar 29	PROBATE JUDGE.	A person not eligible to hold office on the day of the commencement of the term of office cannot qualify for the office four months after the beginning of the term.
45-50	Oct 17	DEPARTMENT OF PUBLIC HEALTH AND WELFARE. CONVEYANCE OF RIGHT-OF-WAY.	The director of the Department of Public Health and Welfare has authority to convey to the State Highway Commission right-of-way needed for a state highway through real estate in which title is vested in said Director as trustee for the State of Missouri.
48-50	Oct 18	SHERIFFS.	It is the duty of the sheriff of each county to collect, after receiving an order from the clerk of the County Court so to do, any tax assessed by said County Court upon any public theatrical or minstrel performances, shows and circuses or any other public exhibits in said county.
48-50	Oct 24	Hon. H. A. Kelso	WITHDRAWN
48-50	Oct 27	BONDS. SHERIFFS. CRIMINAL LAW.	Sheriff has discretion only to determine pecuniary responsibility of surety on bail bond, but cannot determine who may be surety. Refusal to allow responsible person to be surety may be remedied by mandamus or suit for false imprisonment.
49-50	Jan 12	BUREAU OF VITAL STATISTICS. LOCAL REGISTRAR.	Director shall determine extent and duration of a local registration district that becomes a part of a city, and local registrar continues to hold office until removed or succeeded by a qualified successor.

49-50	Jan 19	Hon. Robert G. Kirkland	WITHDRAWN
49-50	Jan 25	INSANE PERSONS.	County not liable for cost of commitment and maintenance of insane person unless said person was physically residing in county at time of commitment.
49-50	Feb 3	MAGISTRATE COURTS.	County wherein Magistrate Court is held is under a duty to furnish to the said Magistrate Court the facilities necessary for the holding of Court and the administration of the Court held in such county.
49-50	Feb 24	ELECTIONS.	Clay County Court has no jurisdiction over that part of Clay County annexed to Kansas City January 1, 1950, insofar as special referendum election, April 4, 1950, is concerned.
49-50	Apr 24	ELECTIONS. POLITICAL COMMITTEES.	Candidates for committeeman and committeewoman in that part of Kansas City located in Clay County will file from the township in which he or she lives.
49-50	May 9	INSANE PERSONS. COUNTY LIABILITY.	The burden of supporting the insane poor rests upon the county in which insane poor have acquired a residence.
49-50	June 5	Hon. Robert G. Kirkland	WITHDRAWN
49-50	June 16	MAGISTRATE COURTS. FEES. PROSECUTING ATTORNEYS.	Several questions relating to the assessment and collection of fees in the magistrate courts, and the certification of fee bills in connection therewith.
49-50	Sept 13	BOARD OF ELECTION COMMISSIONERS. COUNTIES.	It is within the power of the Legislature to provide that the expenses of a board of election commissioners of a city located in two counties shall be paid by both such counties.
52-50	Feb 16	INSURANCE. FOREIGN INSURANCE CORPORATIONS.	Section 6007, R.S. Mo. 1939 prohibiting removal of cases from State Courts to Federal Courts by foreign insurance corporations is unconstitutional.
52-50	Apr 15	INSURANCE.	Approval of Amendment of Articles of Incorporation of Physicians Life and Casualty Company of St. Louis, Mo.
52-50	May 5		Opinion Letter to Honorable C. Lawrence Leggett
52-50	Aug 8	INSURANCE. TAXATION.	Section 6012, R. S. Missouri, 1939, comprehends gross premiums obtained and is not limited to net premiums obtained.
52-50	Oct 6	INSURANCE.	Approval of increase of capital stock of the American Automobile Fire Insurance Company.
52-50	Oct 10	INSURANCE.	Union Automobile Club membership contract providing reasonable,

			minimum and maximum indemnities in money for risks incurred in a contract of insurance and may not be issued without compliance with the Insurance Code of Missouri.
52-50	Dec 11	INSURANCE – INCREASE OF CAPITAL STOCK.	Proceedings of Business Men’s Assurance Company of America increasing its capital stock and authorizing the directors to declare dividend of capital stock comply with the laws of this State and are constitutional.
52-50	Dec 27	INSURANCE.	Approval to increase capital stock of National Fidelity Life Insurance Company.
53-50	Jan 4	ASSESSORS.	County assessor in a fourth class county having a population of 7500 or more should receive forty-five cents for making one assessment list which contains an assessment of the real and personal property all under the same ownership; entitled to forty-five cents for making each nonresident real estate assessment list.
53-50	Sept 15	COUNTY COURT. ROADS.	County Court in Douglas County, a county of the Fourth Class not authorized to pay to the City of Ava any part of the road tax collected within said city for maintaining roads leading into city.
54-50	July 21	Mr. H. M. Long	WITHDRAWN
56-50	Mar 28	OFFICERS.	County Coroner in 4th class county may serve simultaneously in office of police judge in 4th class city.
57-50	Jan 10	COUNTY COURT. HEALTH.	Official health center organization has exclusive control over expenditure of moneys collected to the credit of a county public health center, and upon presentation of a properly authenticated voucher by said organization, the county court must issue a warrant.
57-50	Jan 26	SCHOOLS.	State Board of Education may adopt regulation requiring school buses to be painted yellow.
57-50	Feb 23	SHERIFFS. OFFICERS.	Sheriff entitled to five cents per mile for serving subpoenas in Christian county for a misdemeanor trial in Douglas County; entitled to five cents per mile for transporting prisoner from one county to another; deputy sheriff not entitled to keep any pay for taking prisoner to penitentiary, but guard, not deputy sheriff, entitled to keep such pay.
57-50	Feb 27	MAGISTRATES. CHANGE OF VENUE. CRIMINAL COSTS.	When a change of venue is granted from magistrate in misdemeanor case the defendant is not required to pay any costs until after trial and conviction.
57-50	Mar 10	TAXATION.	Personal property in county under township organization assessed in township in which owner resides.
57-50	Mar 17	CORONERS. COMPENSATION:	Coroner of third class county entitled only to compensation and mileage for services provided by Sections 13259.4 and 13259.5, Mo.

		MILEAGE, RIGHT TO.	R.S.A. 1939. Must pay all fees accruing in office to county treasurer.
57-50	Mar 29	DIVISION OF HEALTH. FUNDS. VITAL STATISTICS.	All funds received by the Division of Health must be deposited in the state treasury.
57-50	Apr 21	DIVISION OF WELFARE. AID TO DEPENDENT CHILDREN.	Division of Welfare shall not accept any statements or certificates from physicians, clinics or other authorities as to the physical or mental incapacity of the parent unless such authorities have been designated by the Division of Welfare to examine the parent. Their statements or certificates of unauthorized examinations of a parent cannot be considered upon appeal.
57-50	Apr 24	CRIMINAL LAW. MISDEMEANOR CASES IN MAGISTRATE COURTS. DISQUALIFICATION OF JUDGE.	In absence of statutory authority magistrate judge may not disqualify himself and certify case to circuit court for trial. Prosecutor may dismiss misdemeanor case any time before defendant is put upon trial, and dismissal will be no bar to subsequent prosecution for same offense in same or any other court having jurisdiction of offense.
57-50	May 6	CRIMINAL LAW – INFORMATION. FALSE PRETENSES.	False pretenses not punishable when based on promise to do an act in the future.
57-50	May 8	HEALTH, DEPT. OF.	Approval of contract for construction of five (5) staff residences at State Hospital No. 3, Nevada, Missouri.
57-50	May 9	HEALTH, DEPT. OF.	Architectural contract in connection with alteration of recreational building at St. Louis State Hospital, St. Louis, Mo.
57-50	May 10	CRIMINAL LAW. ACCESSORY BEFORE THE FACT.	One who procures others to commit a crime is guilty as a principal although he was not bodily present at the time and place where the crime was committed.
57-50	May 16	NOTICE. NEWSPAPERS. PUBLIC BUILDINGS.	Statutory requirement of ten days' notice complied with by insertion in two consecutive issues of a weekly paper provided the first insertion is at least ten days before the award of a contract.
57-50	May 26	HEALTH, DEPT. OF.	Legality of contract for architectural services in construction of dormitory at Federal Soldiers' Home at St. James, Missouri.
57-50	June 19	PUBLIC HEALTH & WELFARE, DEPT. OF.	Approval of proposed contract for repairs of roofs on Criminal Building at State Hospital #1, Fulton, Missouri.
57-50	June 19	PUBLIC HEALTH & WELFARE, DEPT. OF.	Approval of proposed contract for repairs of roofs on property at State Hospital #2, St. Joseph, Missouri.
57-50	Aug 9	LOTTERY.	Scheme whereby tickets are given by merchants with each purchase and drawing held with automobile as prize constitutes lottery even

			though some free tickets are distributed.
57-50	Oct 9	DEPARTMENT OF PUBLIC HEALTH AND WELFARE. LEASE OF FARM LAND OF CONFEDERATE HOME.	Department of Public Health and Welfare and the Division of Welfare does not have authority to lease any of the land constituting a part of the Confederate Home near Higginsville, Missouri.
57-50	Nov 13	TAXATION. COUNTY COURT. ASSESSOR.	Authority of county court to adjust assessment on real estate.
57-50	Nov 17	PUBLIC OFFICERS. FEES AND SALARIES.	Offices of deputy sheriff and city marshal are not incompatible. Party holding these offices entitled to compensation provided for each.
57-50	Dec 12	COUNTY BUDGET SYSTEM.	Expenditures for maintenance of county roads including compensation for personal services cannot be paid out of class five having been budgeted as required by law under class three.
59-50	Mar 29	ELECTIONS. HOLIDAYS.	Special referendum election to be held April 4, 1950 is not a "public holiday" within the meaning of Section 15310 R.S. Mo. 1939.
59-50	Apr 29	AGRICULTURE. SEEDS.	Agricultural seeds containing noxious weed seeds must not indicate that there are no noxious seeds when such seeds are present.
59-50	July 31	Mr. J. L. McMenemy	WITHDRAWN
59-50	Sept 16	AGRICULTURE. FEEDS.	Mixes whole grains are not "commercial feeding-stuffs" and, therefore, not subject to Missouri Feed Law.
59-50	Dec 9	STATE HISTORICAL SOCIETY.	State Historical Society is an agent of the state and not subject to suit.
60-50	Feb 3	CANCER HOSPITAL. CAPACITY TO ACCEPT GIFTS OR BEQUESTS.	The State Cancer Commission acting on behalf of The Ellis Fischel State Cancer Hospital may accept all such gifts or bequests as are consistent with the purposes for which the hospital was organized.
62-50	Jan 17	TAXATION. REVENUE.	Title Insurance Companies, organized under the provisions of Article 17, Chapter 37, R. S. Missouri, 1939, exempted from payment of franchise tax to extent assets of corporation reasonably allocated to such insurance business.
62-50	Feb 17	MISSOURI STATE SOIL DISTRICTS COMMISSION.	The official rules and procedures for fair and impartial referendums on the establishing of soil districts and a selection of soil district supervisors that have been submitted to this department should be and are hereby approved, subject to the modifications and recommendations suggested herein.

62-50	Apr 6	MAGISTRATE COURTS. CIRCUIT COURTS. FILING FEES.	Refund to plaintiff of filing fee paid to Magistrate Court when change of venue is taken to Circuit Court.
62-50	May 25	ROADS AND BRIDGES. COUNTY COURTS.	Revenue derived from special road tax levied under Sec. 8527, Laws 1945, p. 1478, and retained by county cannot be expended on city streets which form a part of a continuous county road if the city lies within an "eight mile" special road district organized under Art. 10, Chap. 46, R. S. 1939.
62-50	June 15	ELECTION.	Declaration of candidacy for Office of Probate Judge sufficient in counties where Probate Judge is also Magistrate.
62-50	Sept 21	SOIL DISTRICTS COMMISSION.	Motor vehicles belonging to the Missouri State Soil Districts Commission must be sold by the state purchasing agent; Money received from the sale of said vehicles must be deposited in the State Treasury, and the Commission cannot spend such funds.
62-50	Oct 10	ELECTIONS. VACANCY AFTER NOMINATION.	When a vacancy in office occurs after any primary and before the general election, such vacancy shall be filled by nomination by the party committee of the proper county, district or state, according to the office to be filled, and such nomination shall be certified to by the chairman or secretary of the party committee.
63-50	Nov 3	Hon. J. P. Morgan	WITHDRAWN
64-50	Feb 21	JUDGMENTS.	The recording, docketing and indexing of a judgment is constructive notice to all parties in interest of the contents and effect of the judgment.
64-50	Apr 28	WORKMEN'S COMPENSATION. DUTIES OF STATE TREASURER.	The duties of the State Treasurer defined in Section 3707(a), Laws of Missouri, 1945, page 1998, amending the Workmen's Compensation Act, are related to the receipt, custody and disbursement of State funds. Said Section 3707(a) is constitutional.
66-50	Apr 29	ADOPTION. JUVENILE COURTS.	Juvenile court of county in which persons seeking to adopt reside or in which child sought to be adopted may be has jurisdiction in adoption proceedings.
66-50	May 31	TAXATION.	Property acquired by taxation-exempt organization after assessment date liable for the taxes for year in which acquired.
66-50	June 1	Hon. O. R. Newcomer	WITHDRAWN
66-50	July 13	ELECTIONS-ABSENTEE BALLOT.	Any officer authorized by law to administer oaths may take the affidavit of a voter of an absentee ballot and make the certificate required by Sec. 11473, but such officer is prohibited from soliciting the voter to vote for or against any candidate or proposition while such

			voter is before him.
67-50	Aug 9	ELECTIONS.	Irregularities in application for absentee ballot and failure of county clerk to post list of applicants or of voters does not affect validity of ballot.
67-50	Nov 27	ELECTIONS. COUNTY CLERKS. CANVASSERS OF VOTES.	When two poll books of the same precinct are filed with the county clerk, then the poll book that has been properly signed by all the judges and clerks of the precinct shall be the poll book accepted by the county clerk, and the other poll book shall be disregarded. The fact that the poll book and tally sheets of a voting precinct show a greater number of votes cast than ballots issued is of no concern of the county clerk or his assistants, who constitute the board of canvassers. The county clerk shall issue certificates of elections to the respective county candidates having the highest number of votes as soon as the canvassers have mathematically determined the total vote cast for each candidate in the county.
67-50	Dec 5	OFFICERS. FEES AND SALARIES.	County superintendent is entitled to full compensation until date of resignation, although he was out of the county most of each week, inasmuch as his compensation is an incident to and attaches to the office.
69-50	June 14	SCHOOLS. TAXATION.	The tax books of a county should be set up by the county clerk extending the school taxes in accordance with the territory incorporated into each legally formed reorganized or enlarged school district, and the former school district numbers comprising said territory should be discontinued.
69-50	Aug 29	COUNTY LIBRARY DISTRICT.	Authorized to purchase personal property necessary to the operation of the county library district; may purchase and operate Bookmobile. Title to Bookmobile would vest in the county library district, a corporate body.
69-50	Sept 21	CRIMINAL LAW. DISTURBING THE PEACE.	The right of religious freedom may not be so construed to justify practices inconsistent with the good order, peace or safety of the state or with the rights of others. Whether the facts stated in your letter constitute a breach of the peace is a question of fact to be determined by all the evidence and circumstances.
70-50	June 30	Hon. Hugh Phillips	WITHDRAWN
70-50	Sept 28	COUNTY HIGHWAY ENGINEER. COUNTY SURVEYOR. COUNTY COURTS.	County court in second, third and fourth class counties authorized to appoint county highway engineer. County court may, in their discretion, appoint the county surveyor as county highway engineer. County surveyor does not hold office as ex officio county highway engineer by virtue of holding office as county surveyor.

71-50	Jan 4	COMPTROLLER. APPROPRIATIONS.	Comptroller should pay claims under appropriation for relief of county clerks although original claim accrued more than two years prior to presentation.
71-50	Mar 6	CRIMINAL COSTS.	State liable for costs of proceedings in juvenile court only where defendant is convicted of offense for which only punishment is imprisonment in the penitentiary or death.
71-50	May 23	OFFICERS. LEGISLATURE.	Person elected to fill vacancy in Legislature entitled to compensation from date of election.
71-50	Nov 16	ELECTIONS. SHERIFFS.	At special election for sheriff candidates may be nominated by political committees or petitions; conventional ballot to be used; names of candidates must be published at least seven days before election; precinct judges and clerks to be same as at general election.
71-50	Nov 21	ELECTIONS. SHERIFF.	Where sheriff dies within nine months preceding general election, successor is to be elected at such general election, and special election cannot be held.
71-50	Dec 22	Hon. E. L. Pigg	WITHDRAWN
72-50	Mar 29	ELECTION BOARD.	Assistant election commissioner properly appointed to position when the meeting attended by four members of election board, two voted in favor of such assistant, one voted against and one did not vote.
72-50	Apr 25	Hon. C. E. Presnell	WITHDRAWN
72-50	Sept 26	LIBRARY. STATE AID.	(a) The power and authority of St. Joseph, Missouri to levy a tax for public library purposes is governed by Laws of Missouri, 1945, page 1287, Section 1a. (b) Section 1a, Laws of Missouri, 1945, page 1287 authorizes the City Council of St. Joseph, Missouri to levy a maximum of three mills on the dollar for library purposes by a legal vote. (c) Figures presented do not comply with alternate standard (1), Laws of Missouri, 1945, page 1134.
73-50	Jan 5	DIVISION OF MENTAL DISEASES. CONTRACT WITH MUNICIPALITIES FOR LABORATORY SERVICES.	The Division of Mental Diseases can enter into a contract with the City of St. Louis for the furnishing of laboratory and post-mortem services to the St. Louis State Hospital.
73-50	Jan 18	SHERIFFS. STATE HOSPITALS FOR THE INSANE.	A county is not liable for the compensation of the sheriff for returning an insane person who escapes from a state hospital.
74-50	Jan 19	DRAINAGE DISTRICTS.	Warrant bears interest from date of presentment and non-payment. Provision for interest from date non-effective.

74-50	Feb 1	COUNTY COURT.	County Court cannot act as agent of individual in purchasing Federal Property.
75-50	June 21	Mr. James. T. Riley	WITHDRAWN
75-50	Oct 2	SCHOOLS.	Maximum compensation of secretary of school board of a town or city school district organized under Article 5, R.S. Mo. 1939, is \$150.00 per year.
75-50	Oct 10	CORONER. DEAD BODIES.	Coroner has no authority to order return of body for holding of inquest. No crime for removing a body from jurisdiction of coroner.
76-50	Mar 22	HEALTH CENTER. TAXATION.	Public health centers tax approved on January 11, 1950, should be collected for the year 1950, based on assessment as of January 1, 1950.
76-50	July 18	Hon. Horace T. Robinson	WITHDRAWN
76-50	July 20	Hon. Horace T. Robinson	WITHDRAWN
77-50	Apr 6	Hon. Leo J. Rozier	WITHDRAWN
78-50	Mar 17	Hon. Carl F. Sapp	WITHDRAWN
78-50	Apr 19	GUARDIAN. WARDS.	Guardian not authorized to invest minor ward's funds in life insurance.
78-50	Oct 4	Hon. Carl F. Sapp	WITHDRAWN
78-50	Nov 2	CENSUS. CIRCUIT COURT REPORTERS.	For the purpose of determining the salary of a circuit court reporter, the 1950 decennial census of the United States becomes official on the date the announcement of the population of the area comprising a judicial circuit is made by the District Supervisor of the census within the area which comprises the judicial circuit.
78-50	Dec 19	LIQUOR. ELECTIONS. MUNICIPALITIES.	Qualified voters as used in the Liquor Control Act means registered voters in cities where registration is required.
81-50	Feb 1	FINANCE. CORPORATIONS.	Provisions of Section 7973, R. S. Mo. 1939, to be complied with by banking corporations before Commissioner of Finance issues certificate of compliance thereunder.
81-50	Apr 18	BANKS – TRUST COMPANIES HOLDING REAL ESTATE.	The Division of Finance may demand, under the terms of sub-section (2) of Sec. 7904, R.S. Mo. 1939, that banks or trust companies holding real estate contrary to Secs. 7951 & 8031, R.S. Mo. 1939, cease and desist from such practice. The Division has no power to compel such corporations to dispose of real estate unlawfully held by them. The

			State by the Attorney General alone may proceed in such cases.
81-50	Apr 20	BANKS. USE OF FUNDS FOR LIFE INSURANCE.	A bank may not use its funds for the payment of insurance on the lives of persons who are not employees or officers of the bank, and in whose lives it has no insurable interest.
81-50	May 3	BANKS – HOLDING REAL ESTATE.	Banks are authorized by the Constitution and statutes of Missouri to transact or permit the transacting of a safe deposit business in an adjoining room to the banking quarters, both being parts of one building, under their right to hold such real estate as is necessary and convenient to the transaction of their business, even though there is no inside entrance or door between the banking quarters and the room where the safe deposit business is transacted.
81-50	May 9	OFFICERS. SPECIAL ROAD DISTRICTS. MUNICIPAL CORPORATIONS.	Same person may hold office of city manager and special road district commissioner.
81-50	May 31	BANKS.	State chartered banks and trust companies prohibited under Section 7953 and Section 8033, R. S. Mo. 1939, from employing moneys in purchasing lease agreements, without recourse, unless the same are taken as collateral security for a loan.
81-50	June 6	CORPORATIONS.	Trust company may extend corporate existence although not engaged in trust business.
81-50	June 14	Hon. W. D. Settle	WITHDRAWN
81-50	June 15	BRANCH BANKING.	The making of loans, taking notes by another corporation, as agent for the bank; from the borrowers and made directly to a bank, some notes made to the other corporation and delivered to the bank without the endorsement of the other corporation, and servicing of all such notes, in a city other than the home city of the bank and in a building other than the banking house of the bank in its home city, constitute branch banking on the part of the bank.
81-50	June 29	TRAINING SCHOOL. BOARD OF TRAINING SCHOOL.	Boy sentenced to twenty years in 1944 and committed to training school where he was paroled is still under jurisdiction of training school upon reaching twenty-one years of age.
81-50	July 6	COUNTY COURT. COUNTY BUDGET.	County court has authority to transfer moneys from one item to another in Class 4 if found necessary and beneficial.
81-50	July 31	BANKS.	Commissioner of Division of Finance not authorized to issue license to mutual savings bank organized in the state of New York to conduct its business in this state.

81-50	Aug 3	BANKS. TRUST COMPANIES.	A trust company operating under Article 3, Chapter 39, R. S. Mo., 1939, may qualify as executor of an estate. Such trust company not required to make deposit of securities with Commissioner of Finance under Section 8068, Article 3, Chapter 39, R. S. Missouri, 1939, if it elects to qualify as such executor by giving bond as required by law for appointment of individuals as executors.
81-50	Sept 18	BANK HOLIDAYS.	Bank holidays may be fixed by banking institutions in Missouri or changed after being fixed by the adoption at least 15 days in advance thereof, of a resolution to such effect by a majority vote of the Board of Directors thereof and posting notice thereof in the bank or trust company for the same time. Holiday must be on a certain day of each week of the year.
81-50	Oct 30	FINANCE RECORDS.	No statutory authority exists authorizing Commissioner of the Division of Finance to dispose of records required to be maintained by Section 7884, R. S. Missouri, 1939, as amended, except as provided in House Substitute for House Bill No. 626, Laws of Missouri, 1945, page 1427.
83-50	June 30	Hon. Forrest Smith	WITHDRAWN
83-50	July 13	SWAMP LANDS. GOVERNOR OF MISSOURI.	The Governor may relinquish the title of the State of Missouri to swamp land which was sold by the United States Government after the passage of the law donating said lands to the State of Missouri when authorized so to do by the County Court of the county in which such land is located.
83-50	Sept 6	MISSOURI RURAL REHABILITATION CORPORATION.	Dissolved corporation formed under provisions of Article 10, Chapter 32, R. S. Mo., 1939 may not be revived. Act of Legislature necessary to permit Missouri to apply for return of assets of Missouri Rural Rehabilitation Corp. held by Secretary of Agriculture.
83-50	Nov 24	SOCIAL SECURITY.	The State may, under the provisions of the Constitution of this State, enter into an agreement with the Federal Government extending old age and survivor insurance benefits to employees of the State and employees of its political subdivisions in conformity with the Federal Social Security Act.
84-50	Mar 1	CRIMINAL PROCEDURE. INDICTMENT AND INFORMATION.	Information drawn in language of Section 4456, R. S. Mo. 1939, charging larceny of money in excess of \$30, will support conviction thereunder, if only special rather than general ownership of property is proved. If property subject to larceny be located in a place properly designated as a dwelling house, the charge may be laid under Section 4459, R. S. Missouri, 1939.
84-50	Apr 12	SCHOOLS. HEALTH.	Division of Health authorized to provide educational instruction for children patients in tuberculosis hospital at Mt. Vernon; school district

			to provide special classes for crippled children if ten or more are found in district.
84-50	Aug 21	ELECTIONS.	Alien wife of United States citizen not entitled to vote when not naturalized.
85-50	Oct 16	AGRICULTURE. LICENSE FEES OF DAIRY PRODUCTS PLANT.	Dairy products manufacturing plant must pay an annual license fee based upon the annual butterfat purchased regardless of where the butterfat is purchased.
85-50	Dec 14	AGRICULTURE.	Creamery indemnifying station operator for loss sustained by purchase of unlawful cream does not violate Missouri Dairy Law.
86-50	Jan 27	NOTARY PUBLIC.	Commission cannot be dated back. No criminal liability for acting after expiration of commission.
86-50	June 7	SHERIFFS. PROBATE COURT.	Oral direction to sheriff by probate judge sufficient to enable sheriff to charge fee for attendance at probate court.
86-50	July 13	Hon. J. L. Sturgis	WITHDRAWN
86-50	July 20	DEPARTMENT OF AGRICULTURE. DAIRY PRODUCTS.	Vegetable or animal fats may not be added to ice cream.
86-50	Nov 13	TRANSPORTATION OF BUILDINGS OR EQUIPMENT OVER STATE HIGHWAYS BY MOTOR VEHICLES. SPECIAL PERMITS REQUIRED, WHEN.	Transportation of building by motor vehicle under Secs. 8599-8604, Mo. R.S.A., also requires special permit from Chief Engineer of St. Highway Dept. under Sec. 304.13, Senate Bill No. 1113. Transportation of equipment of contractor by motor vehicle requires such special permit.
87-50	July 17	SCHOOLS.	Member of school board cannot contract with school district as being in violation of the public policy of the state.
87-50	Aug 7	SCHOOLS.	School board meetings to be valid must be called by the president of the board.
87-50	Sept 25	ELECTIONS – EXPENSE ACCOUNT.	Expense statements required by Section 11790, R.S.Mo. 1939, must be filed by every candidate after both the primary and general elections. Such statement after a primary election may be filed later than 30 days thereafter, but within a reasonable time before the general election.
88-50	Jan 24	AGRICULTURE. COMMERCIAL FEED.	“Ground Grain Screenings” is a “Commercial Feeding-stuff” as defined by Section 14319, R. S. Missouri, 1939, and the Missouri Feed Law, Sections 14319 to 14333, is applicable.
88-50	Sept 18	SCHOOLS.	After organization of enlarged school districts is completed, county

		COUNTY TREASURER.	treasurer may transfer funds of common school districts to credit of enlarged districts without issuance of warrant by officers of common school districts.
88-50	Oct 18	LIENS. VOCATIONAL REHABILITATION.	State-owned equipment used by person receiving vocational rehabilitation aid is not subject to a lien in favor of the owner of a building in which such equipment is used by the rehabilitation client.
89-50	Jan 23	MERGER OF CORPORATIONS. INCIDENT TO MERGER. TAXES.	A foreign corporation having absorbed a domestic corporation of this State by merger must pay the full privilege tax on its increased capital and surplus, if any, arising out of such merger, of such foreign corporation as is represented by the increased value of its property and business transacted in this State. Such corporation is not entitled to a credit on such tax or taxes paid by the domestic corporation upon its original incorporation.
89-50	Jan 30	ELECTIONS. SCHOOLS.	Same persons may serve as judges of special referendum election and school election and same persons may serve as clerks of special referendum election and school election.
89-50	Feb 23	NEWSPAPERS.	Secretary of State must determine political faith of newspapers for publication of notice of referendum election from facts available to him.
89-50	Mar 1	NEWSPAPERS.	Selection of newspapers in City of St. Louis for referendum publication.
89-50	Mar 7	Mr. Walter H. Toberman	WITHDRAWN
89-50	Apr 27	ELECTIONS. POLITICAL PARTY.	Prohibition Party candidates entitled to be certified to county clerks.
89-50	Apr 27	ELECTIONS. POLITICAL PARTY.	Declaration of candidates of "Christian Nationalist" Party insufficient because no evidence that such a party exists.
89-50	May 19	ELECTIONS. POLITICAL PARTY.	Declaration of candidates of Christian Nationalist Party sufficient because evidence of existence of such party is sufficient.
89-50	June 2	INSANE PERSONS. REASONABLE NOTICE OF PROCEEDINGS. QUESTION OF FACT.	Reasonableness of written notice of insanity inquiry served upon alleged insane person prior to hearing as provided by Section 9336 Mo. R.S.A. 1939, a question of fact to be determined from circumstances of each individual case.
89-50	June 21	CENSUS.	The 1950 decennial census of the United States becomes official insofar as the authority of the County Court to pay an assistant prosecuting attorney is concerned, on January 1, 1951.
89-50	Aug 18	ELECTIONS.	Form of Judicial Ballot approved. Instructions to County Clerks and Boards of Election Commissioners approved.
89-50			

89-50	Sept 5	CONSTITUTIONAL LAW. ELECTIONS.	Section 29 (b), Article V, Constitution of Missouri, is not self-enforcing.
89-50	Sept 7	STATE FAIR.	Commissioner of Agriculture may not lease fair grounds to United States from year to year for military purposes.
89-50	Sept 21	INSURANCE.	Town Mutual Plate Glass Insurance Company may be formed under Sections 6203 and 6204, R. S. Missouri, 1939.
89-50	Nov 28	CORONERS. PERPETUATION OF TESTIMONY.	Section 13247, R. S. Mo. 1939, (Sec. 58.54, R. S. Mo. 1949) does not authorize the payment of a stenographer by a county (third or fourth class) to take down the testimony at a coroner's inquest. The coroner shall charge for taking down the testimony at an inquest as provided in said section and pay the money collected for so doing over to the county treasurer by the County court may provide in the County Budget for the expense of necessary stenographic service for and on behalf of the coroner at inquest.
89-50	Dec 15	OFFICERS. GOVERNOR.	Governor shall commission all officers duly elected under the new charter of St. Louis County including county supervisor and councilmen.
89-50	Dec 21	SALE OF COUNTY PROPERTY. MORTGAGE.	County Court has authority to convey real estate belonging to the county; has not authority to accept a note secured by a deed of trust from the purchaser to secure the unpaid balance of the purchase price.
91-50	Feb 24	ELECTIONS.	Form of notice of special election approved.
91-50	July 31	SCHOOLS.	Board of Curators has authority to continue to pay tuition for resident negro students when Lincoln University does not teach certain courses or subjects taught at University of Missouri.
92-50	Feb 24	Mr. Raymond H. Vogel	WITHDRAWN
92-50	May 4	MUNICIPAL AIRPORTS. CONDEMNATION.	An easement in the space above the land, not included within a municipal airport site, for removal of obstructions to air travel to and from the landing field, cannot be acquired by the municipality by the process of condemnation apart from an easement in the real estate itself but may be so acquired as an easement in the real estate.
92-50	June 9	MAGISTRATE CLERKS.	A county is authorized to pay to the clerk of a magistrate court a sum in addition to the amount paid by the state.
93-50	Mar 28	ELECTIONS.	Judges of special referendum election to be selected by County Court from lists of names submitted by the committees of the political parties.
93-50	May 26	CRIMINAL PROCEDURE.	Court cannot require reporter or notary public to take deposition in behalf of indigent defendant without compensation.

93-50	Dec 12	RECORDER.	Plats may be recorded by photostating in first-class counties.
94-50	Feb 28	BUILDING AND LOAN.	Association may not have both an undivided profits and unallocated reserves account.
94-50	June 20	SAVINGS AND LOAN. DISTRIBUTION OF MONEY DUE LIQUIDATED SAVINGS AND LOAN ASSOCIATIONS CONSISTING OF REFUNDS OF INSURANCE PREMIUMS GROWING OUT OF INSURANCE RATE LITIGATION IN UNITED STATES COURT.	Money found by United States Court in insurance rate litigation to be due to certain liquidated building and loan associations being in the nature of premium refunds cannot be distributed according to provisions of Section 82a of S.B. 65, 65th General Assembly but will be escheatable to State of Missouri as unclaimed by the unknown owners within five years of the ruling of the court finding said money to be due to said liquidated savings and loan associations.
95-50	Jan 27	CRIMINAL LAW. VENUE.	Venue in a case of obtaining money under false pretenses lies in the County wherein the money is actually obtained. When checks are involved the money is obtained when the check is charged to the account of the drawer of said check, except when the said check is transmitted through the mails, in which case venue would lie in the County wherein the letter was mailed.
95-50	Feb 10	TAXATION.	Property owned by Veterans' organization exempt from taxation if used only for organization meetings, and not for social or other activities, and if organization is engaged in permanent, fixed projects of charitable nature.
95-50	Feb 16	ROADS AND BRIDGES.	Cost of right of way for new road within special road district is borne either by petitioners for establishment of road or county, or both.
95-50	Feb 27	PROBATE COURTS.	Persons signing administrator's bond as attorney in fact for surety may act as appraiser of estate for inheritance tax purposes.
95-50	Apr 5	CRIMINAL LAW. CHATTEL MORTGAGES.	Prosecution may be instituted under Section 4492 R.S. Mo. 1939 in county from which mortgaged personal property is fraudulently removed.
95-50	Oct 30	SPECIAL TOWNSHIP ROAD DISTRICTS. REPORTS AND SETTLEMENT.	The commissioners of special road districts in counties under township organization shall make and file annually with the township board of directors a detailed report and settlement of all monies received and expended by them.

95-50	Dec 29	PROBATE JUDGES.	Compensation of Probate Judge may be increased during term of office.
96-50	May 18	SCHOOLS. OFFICERS. FEES.	County superintendent who employed other counsel to represent him in a civil action not entitled to reimbursement for attorney fees.
96-50	May 18	GUARDIAN. WARD.	Guardian not authorized to register Series E United States Savings Bonds purchased with minor ward's funds as being jointly owned by minor ward and guardian. Such bonds should be registered in name of minor ward alone, with appropriate reference to legal guardianship.
96-50	July 20	SCHOOLS.	Procedure for second plan of reorganization would be the same as used for the first plan; subsequent proposed plans of reorganization may include previously organized enlarged school districts.
96-50	Aug 31	COUNTY SUPERINTENDENT OF PUBLIC SCHOOLS. SALARY.	If the 1950 census shows a change in population of the county, then the salary of the county superintendent of public schools of such county will be changed in accordance with said census as of July 2, 1951.
97-50	Jan 3	CRIMINAL LAW.	To sustain conviction of leaving scene of accident, defendant must have actual knowledge of the accident and injury to person or damage to property.
97-50	Jan 6	PROBATE COURT. INSANE PERSONS.	The probate court cannot commit a person to a state hospital for the insane for observation after a hearing upon the sanity of a person.
97-50	Mar 14	SCHOOL ELECTIONS AND ELECTIONS.	Clerks and judges of elections serving in dual capacity as clerks and judges for school election and special gas tax referendum election are entitled to compensation in same manner as though said election were conducted separately.
97-50	Mar 15	SUMMONS AND SHERIFFS.	When a suitable person is designated to execute summons under the provisions of Section 28, Laws of Missouri 1945, pages 778 and 779, the summons may be directed to the sheriff or the person designated to execute the summons.
97-50	May 3	ASSAULT.	The shooting and the subsequent striking over the head with a deadly weapon constitutes two separate offenses.
97-50	May 12	Hon. David W. Wilson	WITHDRAWN
97-50	May 22	ROADS AND BRIDGES. TAXATION.	Special road districts formed May 1, 1950 must vote special taxes authorized by Section 8529, Mo. R.S.A., before taxes may be collected for such district.
97-50	June 21	SCHOOL BUILDING AND EQUIPMENT.	(1) The word equipment as used in Section 13, (S.B. 307) Laws Mo. 1947, Vol. 2, page 376 means whatever is necessary to equip a new central school building or any addition to a present building owned by

			the re-organized district for its use as an educational establishment. (2). School busses and school playground equipment would not be included in the definition of equipment because the same does not relate to the use of a school building or its efficient function. (3). Said Act does not contemplate leasing of a building for use as an educational establishment and therefore would not apply to the purchase of equipment for use in a leased school building.
97-50	Aug 9	ELECTIONS.	No vote may be counted in primary for unopposed candidate unless X is placed before name. Marking off name of unopposed candidate does not invalidate ballot as to other offices.
97-50	Oct 13	RESTORATION OF RIGHTS OF CITIZENSHIP BY DISCHARGE FROM PAROLE.	Person paroled by a circuit court when found guilty of penitentiary offense and thereafter discharged from parole, is restored thereby to rights of citizenship including the rights of suffrage.
97-50	Oct 17	ROADS AND BRIDGES. BOUNDARY. COUNTY.	Authority of County Court of Platte County to build and maintain roads on land formerly in Kansas and now in Missouri.
97-50	Nov 2	Hon. Homer F. Williams	WITHDRAWN
97-50	Dec 22	STATE INHERITANCE TAXES PAID TO WHOM.	Inheritance taxes to be paid by administrator to Director of Revenue less 2 1/2% to be paid to probate judge as fees. Judge to account and pay over such fees to Director of Revenue.

Income tax - Personal exemptions of non-resident taxpayers shall be allowable in the same amount as for resident taxpayers.

Rule promulgated by state administrative agency contrary to statute is void.

TAXATION:

Senate Bill 152 to become effective April 14, 1950, enacted by 65th General Assembly, provides personal exemptions of non-residents subject to income tax shall be prorated on basis that the gross income in Missouri bears to the gross income of non-residents for all sources for the year.

February 20, 1950.

Honorable T. R. Allen,
Supervisor, Income Tax Unit,
Department of Revenue,
Jefferson City, Mo.



Dear Mr. Allen:

This office is in receipt of your letter dated January 25, 1950, requesting an opinion concerning the personal deduction allowable to a non-resident individual who is required to pay a Missouri state income tax. In your letter you quote from correspondence with the Kansas City Chapter, Missouri Society of Certified Public Accountants reading, in part, as follows:

"We have been informed that the "Instructions for preparing and filing Missouri income tax returns - individual combination long-short form 28-10" have been filed with the Secretary of State pursuant to the provisions of S.B.No. 196, Laws, 1945-1946. We understand that the filing of these instructions gives them the status of a "rule" under this statute.

"Among other things, the instructions contain the following statement:

"Income subject to tax: non-residents --
* * Such non-resident shall be entitled to deductions as provided for by Section 11349 of our statutes, but such deduction shall be subject to proration on the following basis: where the entire income of such non-resident is not earned or taxable in the State of Missouri, the allowable deduction, including personal exemption, shall be prorated on the basis that the gross income in the State of Missouri bears to the gross income of such non-resident from all sources for the year."

"The above rule, to the extent that it requires the proration of the personal exemption of non-residents, seems to be in conflict with Section 11351, R.S. 1939,

which provides in part as follows:

"For the purposes of this tax, there shall be allowed as an exemption in the nature of a deduction from the amount of net income of each resident individual, * * the sum of \$1,200 plus \$1,200 additional if the person making the return be the head of a family, or a married man with a wife living with him, * *. Provided, further, that if the person making the return is the head of a family there shall be an additional exemption of \$400 for each person dependent on such head of a family if related by blood or marriage * *. A non-resident individual may receive the benefit of the exemption provided for in this Section only by filing or causing to be filed with the Director of Revenue a true and accurate return of his total income, received from all sources, corporate or otherwise, in this State, in the manner prescribed by this Act; * *"

"We would appreciate very much an opinion of the Attorney General relative to the validity of the instructions relating to the personal exemption of a non-resident individual."

That it is the duty of the Director of Revenue to prescribe rules and regulations governing the administration of the income tax law is unquestioned. Section 11345, R. S. Mo. 1939, reenacted L. 1945, p. 1881, Sec. 1; L. 1947, Vol. 1, p. 527, Sec. 1, provides:

"The Director of Revenue may prescribe reasonable rules and regulations for administration of the provisions of the laws relating to the levy, assessment, collection and payment of taxes based on income."

The rules and regulations prescribed by the Director of Revenue must, of course, be in harmony with the statutes enacted by the General Assembly and no valid rule could be prescribed by the Director which would conflict with the provisions of the statutes levying the tax. The Director of Revenue has filed with the Secretary of State rules and regulations dealing with the administration of the income tax law and has published these rules and regulations as instructions to the taxpayers. These rules and regulations contain the following statement:

"INCOME SUBJECT TO TAX: NON-RESIDENTS --
Liability of a non-resident includes every person who is domiciled elsewhere than in the State of Missouri and who is not a resident of Missouri, but who has income from the State of Missouri derived from property owned and earnings derived

from salaries, wages or compensation for personal services of whatever kind and whatever form paid for services performed within the State of Missouri. Such non-resident shall be entitled to deductions as provided for by Section 11349 of our statutes, but such deduction shall be subject to proration on the following basis: Where the entire income of such non-resident is not earned or taxable in the State of Missouri, the allowable deduction, including personal exemption, shall be prorated on the basis that the gross income in the State of Missouri bears to the gross income of such non-resident from all sources for the year. Non-residents of this state should prepare their return to the State of Missouri first and any reciprocal credit to be claimed must be claimed from their resident state."

The question which arises is whether this rule is a correct interpretation of the law to the extent that it requires the proration of the personal exemption of non-residents or should non-resident taxpayers be allowed the full personal exemption allowed to resident taxpayers, without prorating said exemption.

The income tax levy as provided for in Section 11343, R. S. Mo. 1939, Reenacted L. 1945, p. 1881, Sec. 1, reads in part:

"There is hereby levied a per centum tax on net income in each year as follows: * * * a tax shall be levied upon, assessed against, collected from, and paid by every individual, not a resident or citizen of this state, upon net income received from all sources within this state, during the preceding year in excess of exemption now or hereafter provided; exemptions shall be prorated and per centum of tax levied shall be allocated to portions of any year where entire year is not covered or different rates may prevail."

Allowable deductions, including personal exemptions to be allowed non-resident taxpayers are prescribed in Section 11351, R. S. Mo. 1939, Reenacted L. 1945, p. 1881, Sec. 1, as amended L. 1945, p. 1963, Sec. 1:

"For the purposes of this tax, there shall be allowed as an exemption in the nature of a deduction from the amount of net income of each resident individual, * * the sum of \$1,200 plus \$1,200 additional if the person making the return be the head of a family, or a married man with a wife living with him, * *. Provided, further, that if the person mak-

ing the return is the head of a family there shall be an additional exemption of \$400 for each person dependent on such head of a family if related by blood or marriage * *. A non-resident individual may receive the benefit of the exemption provided for in this section only by filing or causing to be filed with the Director of Revenue a true and accurate return of his total income, received from all sources corporate or otherwise, in this State, in the manner prescribed by this act; * * *."

In the foregoing sections the General Assembly has made provision for prorating personal exemptions to be allowed a taxpayer where the entire year is not covered in these words: "exemptions shall be prorated and per centum of tax levied shall be allocated to portions of any year where entire year is not covered or different rates prevail;" further provision is made for prorating other allowable deductions on the basis that the gross income in the State of Missouri bears to the gross income of a non-resident from all sources for the year. As an illustration, certain taxes paid to the federal government are allowable deductions, and in the case of a non-resident taxpayer such a deduction would be prorated in the ratio that his gross income in the State of Missouri bears to his gross income from sources outside this state.

The General Assembly, however, did not provide for prorating the personal exemption allowable to a non-resident taxpayer. For many years it has been the practice to allow a full personal exemption to non-resident taxpayers in the same amount as for resident taxpayers. Senate Bill No. 152 of the 65th General Assembly provides:

"Section 11351a (2). * * * Such nonresident shall be entitled to deductions as provided in Section 11349 but shall be subject to proration on the following basis: where the entire income of such non-resident is not earned in the State of Missouri the allowable deductions, including personal exemptions, shall be prorated on the basis that the gross income in the State of Missouri bears to the gross income of such non-resident from all sources for the year."

By this Act the General Assembly has changed the law to the extent that personal exemptions of non-resident taxpayers shall be prorated on the basis that the gross income in the State of Missouri bears to the gross income of such non-resident from all sources for the year.

It is the opinion of this department that where the entire income of a non-resident taxpayer is not earned or taxable in the State of Missouri, the allowable personal exemption of such non-resident

taxable shall be in the same amount as the allowable personal exemption of a resident taxpayer as provided by Section 11351, R.S. Mo. 1939, reenacted L. 1945, p. 1881, Sec. 1, as amended L. 1945, p. 1963, Sec. 1; further that a rule promulgated by the Director of Revenue providing for prorating the personal exemption allowable to a non-resident taxpayer is contrary to the statutory provision and therefore void; further that the 65th General Assembly has changed this law by Senate Bill 152, said act to become effective April 14, 1950, and provides that where the entire income of a non-resident taxpayer is not earned or taxable in the State of Missouri, the allowable deduction, including personal exemption, shall be prorated on the basis that the gross income in the State of Missouri bears to the gross income from all sources for the year.

CONCLUSION.

The law now provides that non-resident individuals who are required to pay an income tax to the State of Missouri shall be entitled to the personal exemptions as provided by Section 11349, R. S. Mo. 1939, as reenacted L. 1947, Vol. I, p. 527, Sec. 1, and such personal exemption for a non-resident taxpayer shall be in the same amount as for a resident taxpayer.

It is further the opinion of this office that a rule promulgated by a state administrative agency providing for prorating the personal exemption for non-resident taxpayers is contrary to the statutes and therefore void.

The above conclusion is an opinion of the law now in effect. Upon the effective date of Senate Bill 152, the rule or instructions referred to will be in accordance with the statute.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

JEM/LD

TAXATION: Bank Tax Act of 1946, Income representing the payment of interest for which the liability to pay had become fixed and absolute before the commencement of the taxable period would not be subject to the tax imposed by this act.

FILED 1

May 1, 1950

Mr. T. R. Allen
Supervisor, Income Tax,
Department of Revenue,
Jefferson City, Missouri.



Dear Mr. Allen:

This is in reply to your request for an opinion from this department, which request reads as follows:

"In connection with the administration of the Bank Tax Act of 1946, this department desires a ruling with respect to interest which accrues on intangible instruments prior to the year of 1945 which is recovered in years subsequent to that date as to whether or not such interest should be included in arriving at net income when recovery of such accruals are made at a later date.

"The question herein involved is similar to that on which you rendered an opinion under date of January 23, 1950, with respect to the General Intangible Tax Act. It is the contention of this department that due to the fact that under the General Intangible Tax Act, which uses the yield of an intangible instrument as the basis of valuation for the purpose of that tax, that the ruling rendered by you on January 23, 1950, could not be used in connection with the administration of the Bank Tax Act, my reason being that the basis of the General Intangible Tax and that of the Bank Tax is entirely different.

"I would appreciate a ruling from your office in order that we may properly administer the Bank Tax Act. I would appreciate your prompt response as this question has arisen in connection with the preparation of bank tax returns. My inquiries so far have been principally with regard to the maturity of government bonds. In such cases the full amount of interest for the

Mr. T. R. Allen:

May 1, 1950

period of time for which the bonds run is not actually recovered until the bond is eligible for redemption.

"I will appreciate your prompt reply."

The question presented by your letter requires an interpretation of the "Bank Tax Act of 1946" enacted Laws of 1945, page 1921, and imposing a tax on banks in lieu of the tax imposed by Mo. R.S. 1939, Sections 10959 and 10960, under which state and counties levied an ad valorem tax on shares of stock of state and national banks.

For purposes of this opinion your attention is particularly directed to those sections of the Bank Tax Act reading as follows:

Laws of 1945, page 1921, Section 3 is as follows:

"A. Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926, amending Section 5219 of the Revised Statutes of the United States, and every other banking institution as herein defined shall be subject to an annual tax for the privilege of exercising its corporate franchises within the State of Missouri according to and measured by its net income pursuant to the provisions of this Act.

"B. For the period in the taxable year 1946 between the effective date of this Act and the end of the calendar year, the tax shall be measured by the taxpayer's net income as hereinafter defined for the calendar year 1945, or such portion thereof during which the taxpayer was engaged in business.

"C. For the taxable year 1947 and each taxable year thereafter the tax shall be measured by the taxpayer's net income as hereinafter defined for the preceding calendar year.

"D. The rate of tax for each taxable year shall be seven per cent (7%) of such net income.

"E. Each taxpayer shall be entitled to credits against the tax imposed by this Act for all taxes

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paid to the State of Missouri or any political subdivision thereof during the relevant income period, other than taxes on real estate, contributions paid pursuant to the Unemployment Compensation Tax Law of Missouri, and taxes imposed by this Act, except that no credit shall be allowed for any tax paid by any such taxpayer in the year 1945 for its shareholders based upon the value of its shares."

Laws of 1945, page 1921, Section 5 is in part as follows:

"A. 'Net Income' means gross income as defined in paragraph B of this Section minus the deductions allowed in paragraph C of this Section.

"B. 'Gross Income' includes: all gains, profits, earnings and other income of the taxpayer from whatever sources derived during the income period, including but not limited to interest from obligations issued by the United States Government or any political subdivision or any instrumentality thereof, or any state or political subdivision thereof, or issued by any foreign country or nation or political subdivision thereof; all rents, compensation for services, commissions, brokerage and other fees; all gains or profits from the sale or other disposition of any property, real or personal, tangible or intangible; and all recoveries on losses sustained in the ordinary course of business subsequent to the effective date of this Act; * * *

* * * * *

"D. Net income shall be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer, unless such method does not clearly reflect the income, in which case the computation shall be made in accordance with such method as in the opinion of the Director does clearly reflect the income."

Laws of 1945, page 1921, Section 11 is as follows:

"It is the purpose and intent of the General Assembly to substitute the tax provided by this

Mr. T. R. Allen:

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Act for the tax on bank shares which was imposed by Section 10959, Revised Statutes of Missouri, 1939, and for all taxes on all tangible and intangible personal property of all banking institutions subject to the provisions of this Act, and for all property taxes on the shares of such banking institution."

The question herein involved is whether interest which accrued on intangible instruments prior to the effective date of the Bank Tax Act, but which is received subsequent to that date, is to be included as "income" in computing the tax due.

It is our understanding that a bank may report its income for the purposes of this tax either on an "accrual" basis, or report the entire income from intangibles, such as government bonds, in the year in which the bond matures or is redeemed. Many banks have elected to report their income on an accrual basis, by reporting as income the amount of interest which has accrued to the intangible during the preceding year. Those banks electing that option will not pay a tax on that portion of the interest which accrued to intangibles owned by them prior to the effective date of this act, but are taxed only on that interest accruing after the act became effective.

The act directs (Section 5 D) that net income shall be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer, unless such method does not clearly reflect the income, in which case the computation shall be made in accordance with such method as in the opinion of the Director of Revenue does clearly reflect the income. Interest due prior to the effective date of this act, could have been reduced to possession prior to the incidence of this tax. It is, therefore, capital. Interest accruing on or after that date is taxable income. Money owed is income accrued from the time when the liability to pay becomes absolute and in the case of the government bonds mentioned in your letter the liability to pay became absolute before the commencement of the taxable period, though payment was not to be made until after that date. Interest which has accrued after the effective date of the act would, of course, be reported in the year in which it is received if the taxpayer has failed to elect to pay on an "accrual" basis.

The general rule for Federal income taxation, and in substantially all income tax states, is that the tax may be imposed upon income earned or accrued prior to the enactment of the income tax statute. Missouri follows a contrary rule because of the constitutional provision that no ex post facto law, nor law impairing

Mr. T. R. Allen;

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the obligation of contracts, or retrospective in its operation can be enacted. (Mo. C.T. par. 10-003).

From the foregoing statements, we reach the conclusion that the taxpaying bank should report that income which accrues after the effective date of the Bank Tax Act and should not report as income that interest on government bonds mentioned in your letter which accrued prior to the effective date of the act, i.e., where the liability to pay, and the right to receive interest, becomes absolute before the commencement of the taxable period, the payments received thereafter should not be reported as income for that taxable year.

In the case of *Plant v. Walsh*, (280 F. 722) which involved the question of whether dividends declared by a corporation prior to the effective date of the Federal Income Tax Law should be reported as income if received after that law became effective, the court ruled that the interest represents income accrued to the owners of the bonds prior to the incidence of the tax, and does not constitute taxable income when received thereafter. The court said as to the interest payable prior to the effective date of the Income Tax Act of 1913, the liability to pay became absolute before the commencement of the taxable period, though payment was not due until after the beginning of that period. Therefore, the corporate bondholder was not liable to assessment of income tax on interest which was to be paid after the effective date of the taxing act when the liability to pay had become fixed before the taxing act was effective.

Only one case has been reported under the Bank Tax Act. This case, (205 S.W. (2d) 726, 356 Mo. 1204) was an action by the First National Bank of St. Joseph, et al. v. Buchanan County, et al., for a declaratory judgment determining whether plaintiffs were bound to pay, either or both, (1) a tax levied by the City of St. Joseph under the method and plan provided in Mo. R.S. Section 10959, relating to county assessors and assessments under which state and counties levied an ad valorem tax on shares of stock of state and national banks and, (2) the tax levied by the "Bank Tax Act of 1946." The court in that case said:

"The 1945 Constitution changed the scheme of taxation in Missouri. For the purpose of taxation property was divided into three classes; real property, tangible personal property and intangible personal property. As to intangible personal property the Constitution provides that 'All taxes on property in Class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as pro-

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vided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy.' Const. Mo. 1945 Art. 10, Sec. 4.

"To effectuate the purposes of the Constitution and particularly to carry out the contemplated tax scheme the 1945 General Assembly enacted a series of laws. Among other laws, the General Assembly repealed Articles 1 of Chapter 74, R.S. Mo. 1939, Mo. R.S.A. Secs. 10936-10942, entitled 'What Property Taxable and Where,' and enacted the scheme of taxation contemplated by Section 4 of Article 10 of the 1945 Constitution. This act was effective December 19, 1945, Laws Mo. 1945, p. 1799, Mo. R.S.A. Sec. 10942.1 et seq. Another act, effective as of December 5, 1945, repealed the older law relating to county assessors and the assessment of property, Mo. R.S.A. Secs. 10943 - 10969, 10971 - 10995, 10997 - 11000, and enacted a different method and plan relating to county assessors and assessments. Laws No. 1945, p. 1782, Mo. R.S.A. Sec. 11000.1 et seq. This act plainly repealed the previous law, Mo. R.S.A. Secs. 10959 - 10960, under which the state and counties levied an ad valorem tax on the shares of stock of state and national banks. A new act, approved April 19, 1946, which did not specifically repeal any previous law, provided for the taxation of intangible personal property in accordance with the contemplated new scheme. Laws Mo. 1945, p. 1914, Mo. R.S.A. Sec. 11456.1 et seq. A further law, the 'Bank Tax Act' (House Bill 888), levied 'an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926' on all national banks and on all state banking institutions. Laws Mo. 1945, p. 1921, Mo. R.S.A. Sec. 11456.101 et seq. This act provides that 'For the period in the taxable year 1946 between the effective date of this Act, and the end of the calendar year, the tax shall be measured by the taxpayer's net income as herein-

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after defined for the calendar year 1945, * *. And, 'For the taxable year 1947 and each taxable year thereafter the tax shall be measured by the taxpayer's net income * * * for the preceding calendar year.' This act was approved on April 23, 1946, but it recited, in conclusion, 'Since the Constitution of Missouri of 1945 provides that all inconsistent laws shall be void after July 1, 1946, * * * this act shall become effective from and after its passage and approval but shall become operative on July 1, 1946.' Finally, in so far as they bear on this case, the General Assembly enacted a law relating to assessors in cities of the first class and the taxation of real and tangible personal property. Laws Mo. 1945, p. 1253, Mo. R.S.A. Secs. 6301 - 6304, 6306, 6307, 6348.

* * * * *

"But there is a further reason why the Bank Tax Act, Laws of Mo. 1945, p. 1921, could not operate as to these banks in St. Joseph for the entire fiscal year 1946 and thus supplant or supersede the city's tax. The act was approved on the 23rd day of April, 1946 but by its own terms was to 'become operative on July 1, 1946.' As we have noted the act levies an annual tax on banks based on their net incomes. It provides: 'B. For the period in the taxable year 1946 between the effective date of this Act (July 1, 1946) and the end of the calendar year, the tax shall be measured by the taxpayer's net income as hereinafter defined for the calendar year 1945 * * *.' Mo. R.S.A. Sec. 11456.103. For the tax year 1947 and thereafter the tax is to be measured by the taxpayer's income 'for the preceding calendar year,' or here 1946. Plainly, therefore, the act which by its own terms is to become operative on July 1, 1946, levies a tax for the year 1946 on the taxpayers, the banks, income for one half year prior to the operative period of the act if not upon their incomes for 1945. In so doing the act clearly falls within the prohibition of another section of the Constitution. The Constitution of Missouri, the old as well as the new, unlike most constitutions (annotations 11 A.L.R. 518; 109 A.L.R. 523; 118 A.L.R.

May 1, 1950

1153) provides 'That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, * * * can be enacted.' Const. Mo. 1945, Art. 1, Sec. 13. The Schedule does not indicate that any exception to this provision of the Bill of Rights was intended by the Constitution or contemplated in the General Assembly's effectuating the new tax pattern. Even though a tax to be assessed and collected in one year on the income of the preceding year 'is a tax for the year of its collection, and not for the year in which the income was received' (61 C.J. Sec. 2331, p. 1581), the tax imposed by the Bank Tax Act, however it is viewed, is retrospective in its operation and could not be effective in the circumstances of this case and in any event prior to July 1, 1946.

* * * * *

"The Bank Tax Act is certainly retrospective and inoperative as to all the parties in the City of St. Joseph prior to July 1, 1946. The various constitutional and legislative enactments having authorized cities of the first class to levy an ad valorem tax on national bank shares for the tax year 1946 the Bank Tax Act on net income could not be operative as to national banks in the City of St. Joseph after July 1, 1946 because 'The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, * * *.' 12 U.S.C.A. Sec. 548; Buder v. First National Bank, 8 Cir., 16 F. 2d 990; State ex rel Orr v. Buder, 308 Mo. 237, 271 S.W. 508, 39 A.L.R. 1199; Board of Commissioners of Oklahoma County v. State Board of Equalization, 155 Okl. 183, 8 P. 2d 732. The Bank Tax being inoperative in St. Joseph for the year 1946 as to national banks there could be no question of credits in the national banks' 1947 taxes. State ex rel. Meyer Bros. Drug Co. v. Koeln, 282 Mo. 438, 222 S.W. 389; State ex rel. American Mfg. Co. v. Koeln, 278 Mo. 28, 211 S.W. 31. The only reason offered for the Bank Tax Act not being applicable to the state banks after July 1, 1946, is the state's

Mr. T. R. Allen:

May 1, 1950.

policy of maintaining them on a parity with competing national banks. But no legal reason for their being exempted after July 1, 1946, is suggested and we know of none, consequently from and after that date the appellant state banks in St. Joseph are subject to the act and are entitled to the corresponding credits provided 'during the relevant income period.' * * *

From the ruling of the Missouri Supreme Court in this case we find that the Bank Tax statute levying an annual tax on banks based on net income which by its terms was to become operative on July 1, 1946, could not operate retrospectively on income received before such date; that when the liability to pay interest on an intangible became fixed and absolute before the commencement of the taxable period as would be true of interest due on a government bond, then such payment shall not represent income subject to the tax, even though actual payment is made after the act became effective.

CONCLUSION

It is therefore the opinion of this office that the "Bank Tax Act of 1946" does not operate so as to impose a tax based on interest accrued on intangibles before July 1, 1946, when the liability to pay such interest became fixed and absolute before the commencement of the taxable period, even though actual payment of the interest is realized after the operative date of the act.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney General

APPROVED:

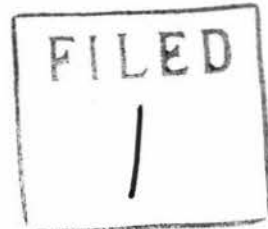
J. E. TAYLOR
Attorney General

MOTOR VEHICLES:

Proof of financial responsibility
to be given only by judgment
debtor whose driver's license was
suspended; when.

PROOF OF FINANCIAL RESPONSIBILITY:

September 5, 1950



Mr. John H. Allison, Supervisor
Motor Vehicle Registration and
Drivers' License Department
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your request for a legal
opinion of this department, said request reading as follows:

"This department respectfully requests an
opinion from your office as follows: We
refer to the Laws of Missouri 1945, pages
1210 & 1211 - Sections 4 (a) and 5 (a).

"In this special case a truck company has
a man driving for them who recently was
involved in an automobile accident, judg-
ment was secured against this party for
\$458.00 in a Magistrate Court at St. Louis,
Missouri.

"After several months the defendant by
having his salary garnished and this
department suspending his license, satis-
fied the judgment. However in our opinion
he has not complied with paragraph (a) in
regard to Financial Responsibility. The
defendant is employed by a trucking company.
They have their truck drivers insured with
an insurance company, but we have no record
of a policy in the name of the defendant,
and the trucking company contends that as
the defendant does not own any car the
insurance company will not insure him; how-
ever the trucking company states that all
their trucks, and the one the defendant
operates for them is insured. Would you
consider the above facts sufficient to com-
ply with the requirements of Paragraph (a)
as above referred to?"

Section 4(a), pages 1210 and 1211, Laws of 1945, authorizing the suspension of the driver's license of a person against whom a judgment has been obtained under the provisions of the Motor Vehicle Act, read as follows:

"(a) The commissioner also shall suspend the license and all registration certificates or cards and registration plates issued to any person upon receiving authenticated report, as hereinafter provided, that such person has failed for a period of 30 days to satisfy any final judgment in amounts and upon a cause of action, as hereinafter stated."

Section 5(a), page 1211, Laws of 1945, provides that the suspension shall remain in effect and reads as follows:

"(a) The suspensions required in Section 4 shall remain in effect and no other motor vehicle shall be registered in the name of such judgment debtor nor any new license issued to such person for the vehicle involved unless and until such judgment is satisfied or stayed and the judgment debtor gives proof of financial responsibility in future, as hereinafter provided, except under the conditions as herein stated in the next succeeding sections."

From the facts outlined in the opinion request it appears that a final judgment was rendered against the defendant by a magistrate court in St. Louis, Missouri, in the sum of \$458.00, and involved an automobile accident alleged to have been caused by the negligence of the defendant. Upon defendant's failure to pay the judgment over a period of several months, proper certification of the judgment was made to the Commissioner of Motor Vehicles, who thereupon suspended the driver's license of the defendant under the provisions of Sections 4(a) and 5(a), supra, of the 1945 Laws.

Since the defendant does not now own a motor vehicle and is employed as chauffeur of a truck owned by a trucking company of Missouri, the employer contends that defendant cannot obtain automobile liability insurance as a sufficient compliance with the financial responsibility statutes, thereby authorizing the Commissioner to issue a new driver's license to the defendant.

It is also contended that proof of financial responsibility on the part of defendant is not required, since the employer carries insurance on all its trucks, including the one driven by defendant.

The Commissioner contends that defendant has not furnished proof of his financial responsibility within the meaning of the statutes, and has requested the further opinion of this department as to whether it is believed defendant has furnished the necessary proof required under such statutes sufficiently to justify the issuance of a new driver's license to defendant.

Section 14 in effect provides that proof of financial responsibility may be made, (1) by evidence that an insurance policy or policies have been obtained and are in full force and effect, naming the person required to furnish such proof, as the insured, and meeting the requirements of Section 18 of the Act, or (2) that such person has deposited securities or money in the manner provided by Section 24 of the Act.

Since the inquiry regarding proof of financial responsibility involves an insurance policy or policies to be furnished, or not to be furnished by defendant individually, only that type of proof of financial responsibility will be discussed here. Section 15(a) in regard to such insurance policies reads as follows:

"Proof of financial responsibility may be made by filing with the commissioner the written certificate or certificates of any insurance carrier duly authorized to do business in this state, certifying that it has issued to or for the benefit of the person furnishing such proof and named as the insured a motor vehicle liability policy or policies, or in certain events an operator's policy, meeting the requirements of this act, and that said policy or policies are then in full force and effect. Such certificate or certificates shall give the dates of issuance and expiration of such policy or policies and certify that the same shall not be cancelled unless 10 days prior written notice thereof is given to the commissioner and explicitly shall describe all motor vehicles covered thereby, unless the policy or policies are issued to a person who is not the owner of a motor vehicle."

While the nature of the insurance policy or policies defendant's employer now has upon the truck driven by defendant is not disclosed, and while such policies may be sufficient liability coverage for the purpose for which they were issued, it appears that such policies naming the trucking company as the insured would not be a sufficient compliance with the financial responsibility statutes on the part of defendant. Said statutes, particularly Section 5(a), supra, provides that the Commissioner shall not issue a new license until the judgment debtor furnishes proof that the judgment against him has been paid, and also furnishes proof of his ability to maintain his financial responsibility in the future. Both acts on the part of the judgment debtor are required to be performed by him individually; performance of either requirement without the other not being a sufficient compliance with the statute. The statute makes no provision for either or both requirements being performed by any person but the judgment debtor, except in one instance.

Where it appears to the commissioner that a person whose driver's license has been suspended and such person is required to give proof of financial responsibility because of a conviction of an offense while driving a motor vehicle belonging to another, and that at the time of the conviction such driver was the chauffeur or a member of the motor vehicle owner's family, then the owner may furnish proof of financial responsibility required of such chauffeur or other person; this procedure is authorized under the provisions of Section 11 of the Act.

From the facts before us it does not appear that defendant was convicted of an offense constituting a violation of any of the provisions of the motor vehicle statutes for which the Commissioner suspended his driver's license, and has required him to furnish proof of financial responsibility in the future, before issuing a new license to defendant. Neither does it appear that at the time of any such conviction defendant was the chauffeur, or the member of the motor vehicle owner's family, or that he was so employed at the time of any such conviction. In the absence of a showing that all of such facts appear, the provisions of Section 11 may not be invoked and the employer of defendant cannot legally furnish proof of financial responsibility for defendant, but since defendant is the judgment debtor, and the person required under above statutory provisions to furnish such proof, the furnishing, or offer to furnish such proof by another person, is sufficient and will not excuse a failure to furnish same by defendant individually.

While it appears that defendant has satisfied the judgment against him, it does not appear that he has made any attempt to

offer proof of his financial responsibility, and to maintain such proof in the future as required by the statutes, and that until such time as satisfactory proof of financial responsibility is offered to the Commissioner by defendant, the Commissioner will not be authorized under the provision of any statute to issue a new driver's license to defendant.

In the event defendant should offer proof of financial responsibility in the form of automobile liability insurance policy or policies, it appears that an operator's policy or policies of the type and coverage described in Sections 16(b) and (c), and also meeting the requirements for such policies provided by Section 18 of the Act, will be a sufficient compliance with the financial responsibility statutory provisions by defendant, after which the Commissioner will be authorized to issue the driver's license.

CONCLUSION

It is the opinion of this department that a person whose motor vehicle driver's license has been suspended for failure to satisfy a final judgment against him, under the provisions of Sections 4(a) and 5(a), pages 1210 and 1211, Laws of 1945, is not entitled to have a new license issued to him by the Motor Vehicle Commissioner of Missouri until such person gives proof to the Commissioner that the judgment has been fully satisfied, and proof of the ability of the judgment debtor to maintain his financial responsibility in the future by one of the two alternate methods provided by Section 14, page 1214, of said 1945 Laws. That is, by offering proper proof that he has obtained one or more policies of liability insurance which are in full force and effect, or that a bond has been duly executed, or that money or securities have been deposited with the State Treasurer in the manner provided by said Act.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DEPARTMENT OF REVENUE: Federal estate taxes are deductible on the
INCOME TAX REGULATION: State income tax return of the Estate paying
said taxes. Gift taxes are deductible on a
State income tax return by the taxpayer who
pays such tax.

October 13, 1950



Mr. T. R. Allen
Supervisor, Income Tax
Department of Revenue
Jefferson City, Missouri

Dear Mr. Allen:

This will acknowledge receiving the following request for an
official opinion, which request is as follows:

"A ruling is desired from your office regarding
the interpretation of the State Income Tax Statutes,
Section 11349, R.S.A. 1939, in regard to the Sub-
division under this Section captioned Taxes, which
reads as follows:

'All taxes paid within the year imposed by the
authority of the United States or its terri-
tories or possessions, or foreign country or under
authority of any state, county, school district or
municipality or other taxing subdivision of any
state or country, not including those assessed
against local benefits and inheritance taxes and
taxes based on income, except those imposed by
the United States on incomes.'

"In connection with this paragraph, I also wish to
quote herewith a ruling with regard to deductions in
connection with administration of the State Income
Tax Law as promulgated by the Department of Revenue
which was filed with the Secretary of State under
date of January 5, 1950, which in part read as
follows:

' * * * not including those assessed against
local benefits and inheritance, estate or
gift taxes * * *'

"The ruling referred to above has been questioned with
respect to federal estate taxes. The inclusion in

this ruling of gift and estate taxes is made by this department having been added on the basis that estate and gift taxes and inheritance taxes are of a like nature, properties received through inheritance, estate or by gift represents something of value received by endowment or gift without being actually purchased.

"It is the contention of this department that inasmuch as the statutes disallow the deduction of inheritance taxes in arriving at taxable income, that likewise estate and gift taxes should also be disallowed as a proper deduction. Properties received under any of the three classifications are primarily not the result of income and it is the firm conviction of this department that there was no intent on the part of our legislature in the passage of this section of the income tax law to allow such deduction for income tax purposes.

"I might refer to the fact with respect to federal estate taxes that they were at one time classified as inheritance tax and in later years the classification was changed to estate taxes. Under the circumstances it is felt that this department was justified in the promulgation of the ruling which is now being contested."

Section 11349, R. S. Mo. 1939, as amended by Laws 1947, Volume 1, pages 531 and 532, provides, in part, as follows:

"All taxes paid within the year imposed by the authority of the United States or its territories or possessions, or foreign country or under authority of any state, county, school district or municipality or other taxing subdivision of any state or country, not including those assessed against local benefits and inheritance taxes and taxes based on income, except those imposed by the United States on incomes.

"Income on which tax is paid in another state or country: Such part of the income in any taxable year on which a tax is imposed by any other state or country and paid to such state or country shall be deducted where such income is included in the taxpayer's return, but such credit shall not exceed such proportion of the tax payable under this Act as the income subject to tax in such other state or country bears to the taxpayer's

net income upon which the tax is imposed by this Act.

The beginning of this section says "In ascertaining net income there may be deducted from gross income derived during the same period the following:" This section does not include estate or gift taxes as the taxes that are excluded from the right to be deducted from gross income by the taxpayer. Your regulation inserts the words estate or gift taxes to supply the omission on the part of the Legislature to use such taxes in the exclusionary clause.

Cooley on Taxation, Vol. 4, Section 1721 defines inheritance tax as follows:

"An inheritance tax is a tax on the privilege of transmitting or receiving property after death as distinguished from a tax on the property affected. It is a tax on the privilege of succeeding to the inheritance or of becoming a beneficiary under the will. The subject of the tax is the transmission from the dead to the living, not the thing transmitted. It is a bonus exacted from the kindred and others 'as the condition on which they may be admitted to take the estate left by a deceased relative or testator.' The term 'inheritance tax,' as generally employed, applies to all transmissions of property occasioned by the death of the owner, whether transmissions by operation of law where one dies intestate, by will, by gifts causa mortis, or by disposition inter vivos in contemplation of death. While the generic term 'Inheritance taxation' is used for convenience it is strictly speaking inaccurate, it has been said by the latest work on this subject which further says: 'For example the federal estate tax is not a tax on inheritances but an impost upon estates, levied before anything reaches the beneficiary. Theoretically this tax is on the transfer from the dead to the living imposed upon the right of the decedent to transmit his property and not upon the right of the beneficiary to receive it. As the tax is on the transfer the term used in the New York statute "Transfer Tax" would seem to be more apt. "A tax levied upon any

form of donative transfer from the dead to the living in contemplation of or effective at death" would seem to cover the various taxes imposed by the states of the union and the federal government under the general subject of inheritance taxation."

Section 1722 of this same work defines estate tax as follows:

"These taxes are sometimes divided into (1) inheritance taxes and (2) estate taxes according to whether the tax is based on the estate or interest of the deceased or the estate or interest of the living, i.e., the heirs or devisees. An 'estate tax' taxes not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death; while an 'inheritance tax' is based on the interest to which the living succeeds. The tax on the right to receive property under a will is to be distinguished from the tax on the right to transmit it. In most states the tax is based on the right to receive property; but in some states the tax is on the right to transmit; and the federal statute is of the latter kind."

Cooley on Taxation, Vol. 4, Sec. 1759, says:

"Income tax statutes, whether a federal statute or a state, are subject to the rule of strict construction the same as other tax statutes; but it is the duty of the courts to observe the fundamental rule to ascertain and give effect to the intention of the legislature. The statute should receive a practical interpretation. 'Persons' is construed as including corporations."

The Taxing Power, State Income Taxation by Tuller, page 362, considers the difference between deductions and exemptions and says:

"The legislative assumption above referred to has probably arisen out of a failure to differentiate between deductions on the one hand and exemptions on the other. They are inherently different things."

Deductions may be defined as expenses properly incurred and losses actually suffered. These must be subtracted from the gross income of the taxpayer, in order to determine what is, in fact, his net income. This is a matter of fact, not a matter of legislative discretion or grace. Exemptions, on the other hand, are subtractions made from net income. Whether any exemptions shall be allowed is in all probability entirely a matter of legislative discretion and grace. But because the Legislature may tax the entire net income, and so may refuse to allow exemptions to be subtracted from net income in arriving at the base on which the tax shall be computed, it does not at all follow that it may prescribe what deductions shall be made from gross receipts in order to arrive at the net income which shall be taxed. They are two entirely different things and are governed by different principles. The former is a matter of law. But whether the income taxed is actually net is a matter of fact.

"It seems inescapable that if the Legislature refuses to allow any necessary and proper element of expense to be deducted from gross income, the tax is, to that extent, not a tax on net income, but a tax on gross receipts. Insofar as existing state statutes attempt to tax gross income, they are believed to be unconstitutional and void. * * *"

The rule concerning the construction of tax statutes is also considered in 51 Am. Jur., Sec. 310, page 361, in which we find the following statement:

"The intention of the legislature with respect to tax statutes must, as in the case of statutes generally, be ascertained from the language of the act. As has been frequently pointed out, a tax cannot be imposed without clear and express language for that purpose. Unless the context shows that they are differently used, the words employed are to be given their ordinary meaning, and the effect of the statute is not to be extended by implication or forced construction beyond the clear meaning or import of the language used; nor is its operation to be enlarged to embrace matters not specifically point out.

* * * * *

"The literal meaning of the words employed in tax statutes is most important, and the general rule requiring adherence to the letter in construing statutes applies with peculiar strictness to tax laws. The rule may not, however, be carried so far as to reduce a taxing statute to empty declarations, to require that to be done which the law does not authorize, or to violate a fundamental principle upon which the government is founded and operated."

A further statement of the rule of construction is found in 51 Am. Jur. Section 316, page 366:

"Although it is sometimes broadly stated either that tax laws are to be strictly construed or, on the other hand, that such enactment are to be liberally construed, this apparent conflict of opinions can be reconciled if it is borne in mind that the correct rule appears to be that where the intent or meaning of tax statutes, or statutes levying taxes, is doubtful, they are, unless a contrary legislative intention appears, to be construed most strongly against the government and in favor of the taxpayer or citizen. Any doubts as to their meaning are to be resolved against the taxing authority and in favor of the taxpayer, or, as it is sometimes put, the person upon whom it is sought to impose the burden. * * *"

The rule of construction is also stated in 47 C.J.S., Sec. 53, page 173, as follows:

"As a general rule internal revenue laws are to be construed liberally in favor of the taxpayer, and strictly or most strongly against the government; and doubts concerning their interpretation or application must be resolved most strongly against the government and in favor of the taxpayer. Before the property of a citizen can be taken under the exercise of the taxing power it is necessary that the statute be clear and unambiguous. The rule applies to statutes laying a tax, to limitation provisions, to words of exception confining the operation of the duty, and to remedial statutes intended to grant relief to

taxpayers, although it has been held that a statute relative to the recovery of taxes paid must be strictly construed, as it is in derogation of the sovereign immunity from suit. Also laws for the redemption of property from sales for taxes have been construed favorably to the owner of the land.

"The rule of liberal construction in favor of the taxpayer does not, however, require the court to reject the plain and reasonable meaning of a statute, or change the rule considered supra Sec. 51, that the language used must be given its usual and ordinary meaning. The revenue acts should receive a fair, reasonable, and, according to some authorities, liberal construction such as will not endanger public interests, and so as effectually to accomplish their purpose, and not permit evasions on merely fanciful and unsubstantial distinctions or make the statute a practical nullity on account of the ease of its evasions."

Gift taxes are defined in 47 C.J.S., Sec. 504, page 732, as follows:

"The Internal Revenue Code, 26 U.S.C.A. Sec. 1000, and similar statutes, impose a tax on the transfer by any individual of property by gift. This tax is not a direct tax on property as such, and its imposition does not rest on general ownership; but it is an excise on the use made of property, on the exertion of the privilege of transmitting title by gift. The gift and estate tax laws, as discussed supra Sec. 478 are closely related and the gift tax serves to supplement the estate tax. The gift tax, however, was passed not only to prevent estate tax avoidance, but also to prevent income tax avoidance by reducing yearly income and thereby escaping the effect of progressive surtax rates."

Estate taxes are not deductible now on federal income tax returns but under prior statutes federal estate taxes were deductible in computing the net income of an estate because the federal statute allowing the deduction of all taxes paid by the taxpayer did not exclude estate taxes. Such taxes are deductible only by the

personal representative of the decedent, and not by a beneficiary or legatee of the estate (see cases cited in 47 C.J.S., Sec. 349, page 510, footnote 95).

27 Am. Jur. Sec. 11, page 369, says:

"The amount paid or payable as inheritance, estate or successive taxes was formerly deductible in computing the Federal income tax of a decedent's estate, and in some instances, in computing the tax of individual beneficiaries. But such deductions are now denied by an express statutory provision.

"In the absence of statutory provisions expressly denying a deduction on account of inheritance, estate or succession taxes, the amount paid or payable in respect of such taxes has been held deductible in computing the state income tax of a decedent's estate."

The leading case on the question whether or not an estate tax could be deducted on an income tax return of the estate prior to the enactment of the federal revenue laws excluding the deduction of estate taxes on income tax returns was the case of U.S. v. Woodward, 41 S.C. 615, 256 U.S. 632, 65 L. Ed. 1131, in which the Supreme Court of the United States said:

"The solution of the question turns entirely upon the statutory provisions under which the two taxes were severally collected. The Act of 1918, by Secs. 210, 211, and 219, subjects the net income 'received by estates of deceased persons during the period of administration or settlement' to an income tax measured by fixed percentages thereof; by Secs. 212 and 219 requires that the net income, as defined in Sec. 213, and making the deductions named in Sec. 214, and by Sec. 214 makes express provision for the deduction of 'taxes paid or accrued within the taxable year, imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes.' This last provision is the important one here. It is not ambiguous but explicit, and leaves little room for construction.

The words of its major clause are comprehensive and include every tax which is charged against the estate by the authority of the United States. The excepting clause specifically enumerates what is to be excepted. The implication from the latter is that the taxes which it enumerates would be within the major clause were they not expressly excepted, and also that there was no purpose to except any others. Estate taxes were as well known at the time the provision was framed as the ones particularly excepted. Indeed, the same act, by Secs. 400-410, expressly provides for their continued imposition and enforcement. Thus, their omission from the excepting clause means that Congress did not intend to except them.

"The Act of 1916 calls the estate tax a 'tax,' and particularly denominates it an 'estate tax.' This court recently has recognized that it is a duty or excise, and is imposed in the exertion of the taxing power of the United States. *New York Trust Co. v. Eisner*, 256 U.S. 345, ante, 963, 16 A.L.R. 660, 41 Sup. Ct. Rep. 506. It is made a charge on the estate, and is to be paid out of it by the administrator or executor, substantially as other taxes and charges are paid. It becomes due not at the time of the decedent's death, as suggested by counsel for the government, but one year thereafter, as the statute plainly provides. It does not segregate any part of the estate from the rest, and keep it from passing to the administrator or executor for purposes of administration, as counsel contend, but is made a general charge on the gross estate, and is to be paid in money out of any available funds, or, if there be none, by converting other property into money for the purpose.

"Here the estate tax not only 'accrued,' which means, became due, during the taxable year of 1918, but it was paid before the income for that year was returned or required to be returned. When the return was made, the executors claimed a deduction by reason of that tax. We hold that, under the terms of the Act of 1918, the deduction should have been allowed."

This case was cited with approval in the case of Farmer's Loan and Trust Company vs. United States, 9 Fed. 688, l.c. 690, in which the court said:

"In providing for the deduction of 'taxes paid within the taxable year,' the statute in an exempting clause enumerates what taxes are to be excepted, which implies a purpose not to except others. U.S. v. Woodward, 256 U.S. 632, 41 S. Ct. 615, 65 L. Ed. 1131. Such taxes as those here in question are not within the exception, and the courts cannot add exceptions to those specifically enumerated by Congress. The executors were required to pay the taxes as an incident in the administration and settlement of the estate. They were paid, not for the account of the devisee and legatees, but in reality for the decedent's account as a tax upon her right to transmit. * * *"

30 Am. Jur., Sec. 3, page 109, states in part as follows:

"The words of a revenue statute are generally interpreted in their ordinary and accepted meaning; and such a statute is to be given a sensible construction. But the courts cannot supply omissions in internal revenue laws."

CONCLUSION

It is the opinion of this department that the regulation, promulgated by the Department of Revenue and filed with the Secretary of State on January 5, 1950, in which estate taxes and/or gift taxes are not allowed as a deduction in connection with a state income tax return, is invalid and beyond the power of the Department of Revenue. Federal estate taxes may be deducted on the state income tax return of the estate paying such taxes. Gift taxes may be deducted on a state income tax return by the taxpayer paying the gift taxes.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

INCOME TAX:
LIMITATION OF ACTION:

Under Laws of Mo., 1949, page 611, section 11363, enlarging the period of limitation during which an assessment of state income tax could be made from three to four years, the four year period becomes applicable to those taxpayers who were subject to an assessment under the three year limitation at the effective date of the amendment on April 14, 1950, but this enlargement of the period of limitation does not revive the possibility of an assessment which has been barred under the three year limitation before the section was amended.

October 18, 1950



Mr. T. R. Allen
Supervisor, Income Tax
State Department of Revenue
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an official opinion from this office reading as follows:

"In connection with the administration of the Missouri State Income Tax Law under Section 143.240, Revised Statutes 1949 (11363, A.L. 1945 p. 1881, A.L. 1949 p. 611) which changed the Statute of Limitation from three to four years. The ruling in respect to this section of the new law is desired as to when this may be applied.

"The new law which was passed in the 1949 General Assembly became effective April 14, 1950. It is the contention of this department that this extension of the Statute of Limitation may be applied to the 1947 years, as the law was passed and became effective before the Statute of Limitation under the old law had expired in connection with the 1947 year.

"I will appreciate you giving this your prompt attention as it seriously affects the limitation of time which this department has to make on adjustments for 1947."

Laws of Missouri, 1949, p. 611 (amending R. S. Mo. 1939, section 11363, as amended by Laws of Mo. 1945, p. 1881) reads as follows:

"In case any taxpayer shall fail to make return as required by law, the director of revenue shall have authority to estimate the amount of such taxpayer's income, from such sources as he may be able to obtain including the business, records and books of any taxpayer, which business, records and books, the director of revenue is hereby given the right to examine during the usual business hours at any time within four years after the return of such taxpayer is required by law to be filed, and the director of revenue shall thereupon make the assessment including all penalties provided. At any time within four years after any return shall have been filed the director of revenue shall have the right to examine, during the usual business hours, the business, records and books of any individual, corporation, joint stock company, joint stock association or partnership, and to issue a credit slip to any taxpayer, if more tax has been paid than legally due, which credit shall be taken as deduction of the succeeding tax or taxes based on incomes to the extent of such credit, and to determine any deficiency not returned by the taxpayer; and thereupon the director of revenue shall make an additional assessment including all penalties provided: Provided, in case of overpayment of tax, the taxpayer shall not be precluded from any other remedy now or hereafter available. The director of revenue and his deputies shall have power to take and administer all oaths specifically required under any provisions relating to taxes based on income. Wherever the term director or director of revenue is used pertaining to the assessment, levy, collection or payment of taxes based on incomes it shall mean director of revenue or his deputies duly authorized by him."

As pointed out in your letter, this section changes the period of limitation during which an assessment may be made from three years to four years. After the expiration of this period, although the tax liability is not destroyed, the remedy for enforcing it is no longer available. The theory of a statute of limitations is that it does not affect the right but destroys the remedy. (Boyce v. Mo. Pac.R.R. 68 S.W. 920, 168 Mo. 583).

In the early case of Ryans v. Boogher (69 S.W. 1048, 169 Mo. 673) we find the Missouri State Supreme Court saying:

"Statutes of limitation, which affect the remedy only are subject entirely to the will of the Legislature and it may repeal them in toto or fix a different limitation at any time before the bar becomes complete, and if the latter, then the new limitation must control."

In the recently decided case of Wentz v. Price Candy Co. (175 S.W. (2d) 852, 352 Mo. 1) the Supreme Court of Missouri said:

"A statute which affects only the remedy may properly apply to a cause of action which has already accrued and is existing at the time the statute is enacted. Ordinary statutes of limitation are held to affect the remedy only. The principle is well settled that the period of limitation prescribed by such statutes may be enlarged and become applicable to existing causes of action, but an enlargement of the period of limitation may not revive a cause of action which has been barred under the limitation as it previously existed. Annotation, 46 A.L.R. 1101. It is the rule in this state that a statute dealing only with procedure or the remedy applies, unless the contrary intention is expressed, to all actions falling within its terms whether commenced before or after the enactment. Clark v. Kansas City St. L. and C.R. Co., 219 M. 524, 118 S.W. 40; Aetna Ins. Co. v. O'Malley, 342 Mo. 800, 118 S.W.2d 3." (Emphasis ours.)

Again in 1944, the Supreme Court said in the case of State ex rel. Bier v. Bigger (178 S.W.2d 347, l.c. 350):

"In that case (Wentz v. Price Candy Company cited supra) we held that the extension of the period of limitation by amendment of a statute would extend an existing cause of action which had not expired at the time of the amendment."

From the foregoing decisions from our State Supreme Court it is the opinion of this office that the extension of the period of limitation by amendment of the statute would extend the existing period during which an assessment could be made, but if the period of limitation had expired at the effective date of the amendment on April 14, 1950, then the lengthened period would not serve to renew the cause which had been barred by the three year limitation.

The three year period of limitation prescribed by the statute is enlarged to four years and becomes applicable to those taxpayers who were subject to an assessment under the three year limitation; but this enlargement of the period of limitation does not revive the possibility of an assessment which has become barred under the limitation as it previously existed.

CONCLUSION

It is the opinion of this office that under the Laws of Missouri, 1949, p. 611, Section 11363, which enlarged the period of limitation during which an assessment of state income tax could be made from three to four years, the four year period becomes applicable to those taxpayers who were subject to an assessment under the three year limitation at the effective date of the amendment on April 14, 1950; but this enlargement of the period of limitation does not revive the possibility of an assessment which has already been barred under the three year limitation before the section was amended.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

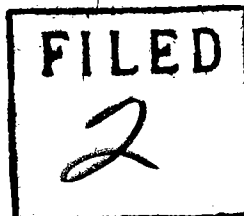
J. E. TAYLOR
Attorney General

PUBLIC BUILDINGS: State is liable only to general contractor and not to sub-contractors under construction contracts.

CONTRACTS:

2/3/50

February 3, 1950



Honorable Fred Appleton
Director
Division of Public Buildings
Jefferson City, Missouri

Dear Mr. Appleton:

This is in reply to your request for an opinion which is as follows:

"The Infirmary Building in Nevada, Missouri, is contracted by Seth E. Glem and Associates. They have completed this building and now only await final inspection and payment.

"Now that the contractor is nearing completion, we have a request from the excavation sub-contractor that he be allowed an extra for approximately \$7,619.35. We desire that you study this matter to see if we owe the sub-contractor this money.

"This job was started during Mr. Powell's supervision and on my first visit to the site the contractor was requesting a location where he could get earth in order to fill around the building. At that time there was no question as to whether the contractor would be paid extra for the dirt, for by that time it was decided that the contour plans used were off approximately two feet. This matter has never been presented in the form of a bill until approximately 20 days ago.

"I wish to state the fund for this building has been re-appropriated; however, there remains less than \$2,000.00 in this fund, so it would be impossible to pay for the actual excavation with the funds we have available.

"I would like to call your attention to the paragraph on 'EXTRA WORK', Page SC-2, 'No extra work

Honorable Fred Appleton

shall be done until this written order is received.' At no time during the progress of this job had the change order been negotiated for this excavation.

"For further reference, Page A-1 on 'EXCAVATION' end of paragraph 5, 'The elevations as shown on the drawings is assumed rock levels as based on test hole data indicated on the site plan. More or less depth of excavation other than that called for by the drawings will be adjusted on the basis of unit price.' Paragraph 7, 'SURVEYS -The contour plans of the site show the present elevation of top surface of materials at intervals spaced throughout the site. The surface elevations were obtained from actual surface of the site and from the best attainable information, but the owner will assume no responsibility for same. Acceptance of the data given on the drawings shall be done at the contractor's risk and responsibility.'

"I cannot allow an extra for the full amount of \$7,619.35, due to the fact that this fund does not have sufficient revenue to cover.

"I would appreciate greatly if you would study the specifications and determine whether the State is liable for this extra excavation claimed by the sub-contractor."

We have examined the various documents which form the contract between Seth E. Glem and Associates, the general contractor, and the State of Missouri. The liability of the State for any extras must be founded on the contract between the State and the contractor. The sub-contractor's rights under this contract are only derivative, and his right to recover must be considered in the light of the provisions of his contract with the general contractor.

Article 16 of the contract between the State of Missouri and the general contractor states as follows:

"Article 16. THE CONTRACT DOCUMENTS--The general conditions of the contract, the specifications and the drawings, together

Honorable Fred Appleton

with this agreement, form the contract, and they are as fully a part of the contract as if thereto attached or herein repeated. The following is an enumeration of the specifications and drawings: "

On page GC-1 of the Specifications is to be found the following provision:

"A.1.A. GENERAL CONDITIONS: The general conditions in accordance with the standard form of the American Institute of Architects, a copy of which may be seen at the office of the Architects, are to be considered as part of this contract as if included herewith, together with the other general conditions set forth in these specifications."

The general conditions in the standard form of the American Institute of Architects of the contract for the construction of buildings may be found in Modern Legal Forms, Volume 1, Section 1762, pocket supplement. A portion of Section 36 of the standard form is as follows:

"Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the owner."

Where a contractor sublets a contract, and there is, as here, no contractual relationship between the owner and the sub-contractor, the latter cannot pass by the contractor, his immediate employer, and sue the owner for an amount due him on the contract. This is true despite the fact that the work is done under the direction and in accordance with plans furnished by the owner. (Baker vs. McMurry Contracting Company, 223 S.W. 45).

Since the claim presented is one by the sub-contractor, it is not necessary to discuss the possible liability of the State to the general contractor. If the sub-contractor is entitled to recover for any extra work, the liability therefor is that of the general contractor and not that of the State of Missouri.

CONCLUSION

Therefore, it is the opinion of this department that the State of Missouri is not liable to the sub-contractor

Honorable Fred Appleton

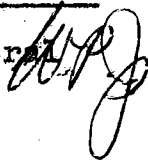
for extra work done by the sub-contractor in connection
with the construction of the infirmary building at State
Hospital #3, Nevada, Missouri.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



JRB:ir

PENITENTIARY: Watchmen employed by Industrial Department
HOURS OF LABOR: of Missouri State Penitentiary not within
WATCHMEN: provisions of Section 9039, R. S. Mo. 1939,
setting maximum daily and weekly hours of
work.

February 16, 1950



Mr. H. P. Andrae
Representative of Cole County
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

"As Representative of Cole County, Missouri, I have been requested on numerous occasions by certain employees of the Industrial Department of the Missouri State Penitentiary to introduce a bill in the Legislature limiting the hours of work to eight hours per day or a maximum of fifty-six hours per week for watchmen employed by the Industrial Department of the institution as is provided in the above mentioned Section for guards and turnkeys. (Section 9039, R. S. Mo. 1939) Such watchmen are now required to work twelve hours per day, seven days per week.

"However, I have never been able to convince myself of the necessity for such action as it appears probable that it was the intention of the Legislature in enacting Section 9039, Revised Statutes of Missouri, 1939, to include guards, turnkeys and any other person or persons performing similar or like services, which should include night watchmen employed in the Industrial Department of the institution, under the provisions of this statute.

"I will, therefore, appreciate your opinion as to whether or not under the terms of this statute watchmen in the Industrial Department of the Missouri

State Penitentiary are required to work more than eight hours per day, or fifty-six hours per week, or whether they are included within the provisions of that statute.

"I might further add that unquestionably the act of the 1945 Session of the Legislature, entitled 'State Merit System Act', Laws of Missouri, 1945, pages 1157 et seq. repealed by implication that provisions of the present Section 9039 would respect the payment of the salary provided therein. Moreover, Section 2b of the Merit System Act, found on page 1158, Laws of Missouri, 1945, specifically includes employees of the State Department of Corrections, and Section 15 of the Act, found on pages 1165 and 1166, Laws of Missouri, 1945, provide the method whereby a plan shall be provided for each of the various employees referred to in Section 2b of the Act. However, Section 9039 has not been repealed in its entirety by the Legislature.

"I will sincerely appreciate your furnishing me your opinion on this matter in order that I may be guided accordingly."

Section 9039, Revised Statutes of Missouri, 1939, provides in part as follows:

"All turnkeys and guards shall receive for their services the sum of one hundred thirty-five dollars per month and no guard or turnkey or any other person or persons performing similar or like services shall be compelled to work more than eight hours per day, and any such employee shall not work more than fifty-six hours per week, and all watchmen shall receive one hundred and fifteen dollars (\$115.00) per month; and provided further, that nothing in this section shall apply to any penal institution in this State other than the Penitentiary. Nothing herein, however, shall be construed as to prevent the commission of the department of penal institutions from suspending the operation of

such rule fixing the time of regular daily service of employees in case of emergencies, and said commission shall have full power to determine the existence and duration of such emergencies, and its finding in respect thereto shall not be subject to review by any other power."

Turnkey is defined as follows in Funk and Wagnall's New Standard Dictionary:

"one who has charge of the keys of prison doors; a keeper, jailer."

Guards at the penitentiary, of course, are those who have the convicts under their supervision. We believe, therefore, that the persons performing services similar or like those of a turnkey or guard are those persons who are in charge of and supervise convicts.

We are informed by the Superintendent of Industries of the Missouri State Penitentiary that the watchmen employed by such division do not supervise or have charge of any convicts, but their duties consist only in keeping a watch over the physical properties of the penitentiary and in maintaining a guard against fires and other hazards.

Therefore, we believe that the watchmen employed by the Industrial Department of the Missouri State Penitentiary do not perform services similar to or like the services performed by turnkeys and guards, and that the limitation relating to maximum daily and weekly hours of work of turnkeys and guards and persons performing similar or like services does not apply to such watchmen. We believe this view to be borne out by the fact that in the sentence in Section 9039 quoted supra, which makes a provision for maximum daily and weekly hours worked by turnkeys and guards and those performing similar or like services, that "watchmen" are mentioned and no reference is made limiting the daily or weekly hours to be worked by such watchmen.

Since we have ruled that "watchmen" are not affected by the limitation on daily or weekly hours of work, contained in Section 9039, we deem it unnecessary to discuss Section 32 of the Merit System Act, Laws of Missouri, 1945, p. 1157, providing that the regulations shall provide for the hours of work, holidays, attendance and leaves of absence in the various classes of positions subject to the Merit System Act.

Mr. H. P. Andrae

-4-

CONCLUSION

It is the opinion of this department that the limitation upon maximum hours to be worked daily or weekly at the Missouri State Penitentiary by turnkeys or guards, or persons performing similar or like services, does not apply to watchmen employed by the Industrial Department of the Missouri State Penitentiary.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PUBLIC BUILDINGS: Law relating to fixtures.

March 1, 1950

3/2/50

Honorable Fred Appleton
Director
Division of Public Buildings
Jefferson City, Missouri

FILED

2

Dear Mr. Appleton:

This is in reply to your request for an opinion which reads as follows:

"I would appreciate having your opinion in reference to the rights of the present owners or lessee in removing certain fixtures and appurtenances from the buildings under condemnation proceedings on the proposed site for the new state office building, more particularly described as plumbing fixtures and furnaces, also the gasoline pumps, tanks and hydraulic lift located on the site of the Cities Service Service Station.

"If the State has the right to claim the above mentioned items, it will of course add to the sale value of buildings involved."

In the case of State vs. Haid, 59 S.W. (2d) 1057, the law in Missouri relative to the removal of fixtures on property involved in condemnation proceedings is set out as follows, l.c. 1059:

"In the case at bar, the house, barn, and fences, being fixtures to the land condemned, would pass to the condemner unless there was an agreement between the parties that such fixtures would be reserved by the owner and not taken into consideration in the condemnation proceeding. City of St. Louis v. St. Louis, I.M. & S. Railway Co., 266 Mo.

Honorable Fred Appleton

694, 182 S.W. 750, 754, L.R.A. 1916D, 713, Ann. Cas. 1918B, 881. Evidently such an agreement was made, because the opinion of the Court of Appeals states that the house, barn, and fences were not condemned. Such a thing could not have happened except by agreement of the parties because the fixtures were a part of the realty and could not be separated therefrom except by agreement. City of Kansas v. Morse, 105 Mo. 510, 519, 16 S.W. 893. Absent an agreement between the parties, the highway department would have been required to pay for the fixtures and remove them from the highway at its own expense. But where, as here, by agreement between the parties, the landowners reserve the fixtures and remove them from the highway, the cost of such removal is governed by the agreement between the parties, either express or implied, and not by the law governing the assessment of damages in condemnation. In this situation the landowner could not recover the cost of removing the fixtures from the condemned land unless the agreement between the parties so provided. * * *."

We understand the facts to be that there has been no agreement between the State and the interested parties, with respect to the removal of fixtures. Therefore, we turn to the general law to determine whether or not the specific fixtures mentioned in your request have become a part of the realty so as to pass title. Since your request is concerned with several different items we will consider them in order.

1) Plumbing Fixtures--Furnaces--In the case of Manufacturers Bank & Trust Co. vs. Lauchli, 118 Fed. Rep. (2d) 607, the rule in Missouri is set out as follows at l.c. 611:

"The tests to determine whether a thing is a fixture are, in Missouri, stated thus: 'If there be a question * * * as to an agreement that it shall become a fixture, the tests have been said to be: (1) Real or

Honorable Fred Appleton

constructive annexation of the property in question to the soil; (2) adaptation of the property in question to the ordinary use or purposes of the land to which the alleged fixture is annexed; and (3) the intention of the party making the annexation to make the property in question a permanent accession to the freehold.

* * * And of these three unities the question of intention is said to be controlling.' Hatton v. Kansas City, C. & S. Ry. Co. 253 Mo. 660, 162 S.W. 227, 233. The same measure is more concisely stated as 'annexation, adaption, and intent, with the latter ordinarily of paramount importance.' Matz v. Miami Club Restaurant, Mo. App., 127 S.W. 2d 738, 741. Also see American Clay Machinery Co. v. Sedalia Brick & Tile Co., 174 Mo. App. 485, 160 S.W. 902.

"Applying these tests, we need spend little effort upon the 'adaptation' test because it is clear that all of them were adapted to and were used in the operation of the plant although some of them were not necessary therefor. Also, the 'intention' test is not difficult because, with one exception ('1 Winch and Hoist Tower with Motor'), they were brought for and intended to be used permanently in connection with the operation of or with the business of the plant. Also, the mortgage was expressly upon, 'the packing plant and property and office' of the mortgagee and was to cover 'all the * * * machinery, tools, fixtures, equipment and appliances erected on or used as part of said plant, or which may hereafter be so erected or used.'

"The 'test' requiring most attention is that of 'annexation' to the realty. We think the application of this test should be governed by the two practical considerations of (1) character of physical annexation (attachment) to the plant having permanent usage in view,

Honorable Fred Appleton

and (2) the effect upon the plant as a complete unit of the presence or absence of the particular thing. Such application will eliminate all purely personal property and will include all attached property reasonably necessary to operation of the complete plant as it was being operated as a unit. * * * ."

Applying the tests of annexation, adaptation and intention, we believe that the plumbing and furnaces have become a part of the realty. Most of these items are located in the hotel property and it is obvious that they are necessary for the operation of a hotel business.

In the case of Frederick v. Smith, 111 So. 847, noted in 81 A.L.R. 1442, the Court said:

"* * * 'While it is possible for a family to use a dwelling house which contains neither bathtub nor kitchen sink, it cannot be contended with reason that the owner of a dwelling house who has installed therein such articles would have the right to remove the same upon a sale of the property without reservation.'"

In the case of Ferdinand vs. Earle, 134 N.E. 603, the Court held that a steam boiler installed in a building, on premises subject to a mortgage, as an auxiliary heating plant for the building in which it was installed and for the purpose of heating a garage on adjoining property, was a part of the realty on which it was installed and passed therewith to a purchaser at a sale on foreclosure of the mortgage. The Court reached its conclusion after considering the purpose of the installation of the boiler, its great weight, and its connection with the water pipe. The furnaces in the situation before us have been installed recently as a means of furnishing a central heating system for the hotel building. Applying the test, we believe that the furnaces have become a part of the realty and that title thereto has passed to the State.

2) Trade Fixtures-- We approach the problem of the removal of trade fixtures in two ways. If there

Honorable Fred Appleton

is an agreement between the owners of the property and the Cities Service Oil Company that certain items should remain personalty, it is clear that they have not been compensated for in the proceedings, and that they may be removed from the property by the oil company. (See *Pile vs. Holloway*, 107 S.W. 1043, 129 Mo. App. 593). However, absent such an agreement, we must determine whether or not such items of personal property have become a part of the realty so as to pass with the realty. Referring again to the test as set out in *Manufacturers Bank & Trust Co. vs. Lauchli*, supra, we must determine the status of the particular items. Since we are without facts to determine the intention of the party making the annexation, we cannot consider that test and must turn to the annexation and adaptation tests. As to the annexation, it seems clear that the hydraulic lift and gasoline pumps may be removed without substantial injury to the freehold. However, in the case of the tanks, the removal thereof would result in a substantial injury to the freehold and, therefore, must be held to have been so annexed that they have become a part of the realty.

CONCLUSION

Therefore, it is the opinion of this department that the gasoline pumps, tanks and hydraulic lift may be removed by the owners thereof, but that plumbing fixtures and furnaces have become so annexed to the realty that title thereto passed to the State in condemnation proceedings, and, therefore, are no longer the property of the former owners.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ir

PUBLIC BUILDINGS: In the construction and repair of public buildings Missouri products must be used if obtainable at reasonable market prices.
UNIVERSITY: Discretionary with officers awarding the contract.

May 15, 1950

Honorable Roscoe Anderson
Member
Board of Curators of the
University of Missouri
705 Olive Street
St. Louis 1, Missouri



Dear Mr. Anderson:

This is in reply to your request for an official opinion which reads as follows:

"The Board of Curators of the University of Missouri request your opinion as to the following matter.

"Pursuant to the appropriation of \$600,000.00 for the construction and equipment of a Classroom Building, which was made by Section 9.060 of House Bill 436, passed by the 65th General Assembly, bids for the construction of a Classroom Building for the University of Missouri have been invited, opened and considered by the Board of Curators. The specifications and bid forms provided for base proposals calling for the use by the contractor of Missouri Carthage limestone for cut stone trim and for an alternate proposal calling for the use of Bedford, Indiana, limestone for cut stone trim. The Board is not purchasing any materials, but is letting a contract for the completed building.

"The bids are in. The lowest and best bid for the completed building is \$461,897.00 if Missouri Carthage limestone for the cut stone trim is used, and \$16,202.00 less,

to-wit, \$445,695.00 if Bedford, Indiana limestone is used for the cut stone trim. The stones are equally suitable for the purposes intended, to-wit, trims.

"In view of the provisions of Chapter 108, R.S. Mo. 1939, and particularly of Section 14,618, is it permissible for the Board to accept the lower bid and thereby save the taxpayers of Missouri \$16,202.00?"

Section 14618, R.S. Mo. 1939, is as follows:

"Every commission, board, committee, officer or other governing body of the state, charged with the construction or repair of public buildings, and every person acting as contracting or purchasing agent for any such commission, board, committee, officer or other governing body of the state, shall purchase and use only the products of the mines, forests, and quarries of the state of Missouri, when they are found in marketable quantities in the state, and all such materials contracted for shall be of the best quality and preference shall be given to such Missouri materials and labor where same are of a suitable character and can be obtained at reasonable market prices. Any contract or contracts for materials made in violation of the provisions of this section shall be void and in the event of the construction or repair of public buildings where products of mines, forests and quarries other than as enumerated above are used, the state auditor shall not audit nor the state treasurer pay any warrants issued in payment for said construction."

You will note that Section 14618 makes it mandatory to use Missouri materials where same are of a suitable character and can be obtained at reasonable market prices. In the case now before us you indicate that the cost of the building will be less if the Board uses Bedford, Indiana limestone

instead of Missouri Carthage limestone for cut stone trim.

Section 14616, R.S. Mo. 1939, is a similar provision concerning the purchase of Missouri products by certain officials. However, in Section 14616 the Legislature provided for the use thereof when they could "be secured without additional cost over foreign products or products of other states. . . ". The Legislature has not seen fit to place this limitation in Section 14618. We have been unable to find any decisions which directly interpret this Act or similar statutes in the other States. There have been cases which hold that such provisions do not violate various clauses of the Federal Constitution. (See 43 Am. Jur., page 747; State vs. Senatobia Blank Book & Stationery Co., 76 So. 258, and Ex parte Gemmill, 119 Pac. 298.)

Therefore, we now have for interpretation a statute duly enacted by the Legislature which declares the public policy of this State to be that Missouri products shall be used in the construction and repair of public buildings. The only limitations on this policy is that the same must be found in marketable quantities and be obtained at reasonable market prices. Since there is no absolute method of determining these questions in every instance, it must be assumed that the Legislature intended to vest in officers letting contracts for public works, discretion to determine the existence of these factors.

Therefore, we must look to the general rule of law concerning the exercise of discretion by officers in the awarding of contracts. In 43 Am. Jur., page 101, the rule is expressed as follows:

"In accordance with the rule that courts will not in general attempt to interfere with or control the exercise of discretionary powers, where discretion is conferred on an officer, or board of officers, to enter into contracts on behalf of their government, and that discretion has been exercised, the courts will not inquire into the wisdom or skill which may have accompanied the exercise of the discretion. But the courts will interfere when it appears that officers have acted arbitrarily, dishonestly, or beyond the reasonable limits of the discretion conferred upon them."

And, again, in 43 Am. Jur. at page 78, the text is:

"Every public officer is bound to perform the duties of his office honestly, faithfully, and to the best of his ability, in such a manner as to be above suspicion of irregularities, and to act primarily for the benefit of the public. * * * ."

Thus, it has been made the duty of certain officers to exercise their discretion to determine whether or not Missouri products for use in the construction and repair of public buildings can be obtained at reasonable market prices.

The word "reasonable" is defined in Webster's New International Dictionary, Second Edition, Definition 2, as follows:

"In accordance with reason; of men, acting, speaking, or thinking, under the guidance of reason; just; fair-minded; of their acts, thoughts, etc., agreeable to reason; not beyond the bounds of reason, logic, probability, etc.; as, a reasonable assumption, decision."

In Black's Law Dictionary "market price" has been defined as:

"The actual price at which the given commodity is currently sold, or has recently been sold, in the open market, that is, not at a forced sale, but in the usual and ordinary course of trade and competition, between sellers and buyers equally free to bargain, as established by records of late sales."

Keeping in mind the admonition that words and phrases used in statutes shall be taken in their plain or ordinary and usual sense we believe that the above definitions may be useful in assisting the Board in determining whether or not the Missouri products can be obtained at reasonable market prices. At the same time, however, the Board must carry out

the public policy as stated by the Legislature. There are many cogent reasons for this policy of using Missouri products in the construction and repair of public buildings. The manufacturers pay taxes to the State and other political subdivisions, and they employ Missouri citizens, thus keeping in Missouri a great part of the purchase price of the materials, thereby enhancing the public interest of the people of the State of Missouri. In view of all the above we do not believe that it can be declared as a matter of law that the Board of Curators would be acting arbitrarily or beyond the limits of the discretion conferred upon them by making use of the Carthage limestone in the building. At the same time we believe that it would be permissible to use the other product, since it is discretionary with the Board to determine the reasonableness of the price.

It seems to us therefore that, if the Board of Curators, in the exercise of its discretion, determines that the Carthage limestone can be obtained at reasonable market prices it must accept the same. If a contrary decision is reached it is permissible to accept the lower bid and effect a saving thereby.

CONCLUSION

Therefore, it is the opinion of this Department that, if the Board of Curators determines that Missouri materials can be obtained at reasonable market prices it must use the same in the construction or repair of public buildings. If the Board determines that Missouri materials cannot be obtained at reasonable market prices the Board may use the products of another State.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS) Board of Directors of six director school district not
) authorized to determine right of duly elected director
) to his new office.

March 14, 1950

Honorable Roderic R. Ashby
Prosecuting Attorney
Mississippi County
Charleston, Missouri



Dear Sir:

The following opinion is rendered in compliance with your request of February 3, 1950, reading as follows:

"U, V, W, X and Y are members of Z School Board. A has been duly elected as a school board member. A does not have a State and County Tax Receipt, neither is A's name on the county tax books.

"Should U, V, W, X and Y refuse to swear A in as a member of the Z School Board when A cannot produce a tax receipt showing that A has paid a state and county tax within the preceding twelve months?"

Section 10469, R. S. Missouri, 1939, prescribes the qualifications for directors of a six director school district, and reads as follows:

"The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state for one year next preceding their election or appointment, and shall be at least thirty years of age, who shall hold their office for three years and until their successors

Honorable Roderic R. Ashby

are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term."

A school district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. (Consolidated School District No. 6, Jackson County v. Shawhan, 273 S.W. 182.)

Section 10470, R. S. Missouri, 1939, as re-enacted Laws of Missouri, 1945, page 1649, provides for the organization of the board of directors of a six director school district within four days after the annual meeting. In your opinion request you disclose that "A" has been duly elected as a school board member of the school district in question. Although Section 10469, R. S. Missouri, 1939, supra, prescribes the qualifications for directors of a six director school district, we have been unable to find any statute giving such directors the right to challenge the election of a duly elected director to his office by prescribing and imposing a rule that he must present a state and county tax receipt showing that he is a taxpaying citizen. In the case of Fly v. Jackson, 45 S.W. (2d) 919, 226 Mo. App. 203, the Springfield Court of Appeals in this state was discussing the proper method to try title to office in Missouri, and quoted approvingly from ruling case law as follows at 226 Mo. App. 203, 1. c. 211:

"* * * 'Quo warranto will lie only when the party proceeded against is either a de facto or a de jure officer in possession of the office, and an office that is vacant is in possession of no one. However, a person actually obtaining office with the legal indicia of title is legally in possession thereof, and is a legal officer until ousted. Such an incumbent is an officer de facto if not de jure, that is, one who is in possession and discharging the duties thereof under color of authority. By color of authority is meant authority, derived from an election or appointment, however irregular or informal, so that the incumbent is not a mere volunteer. If the office is actually filled by one holding under the legal indicia of title, there can

Honorable Roderic R. Ashby

be no inquiry except upon quo warranto,
and until the incumbent is ousted no one
else can have any enjoyment of the
office."

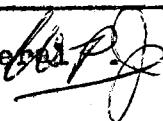
CONCLUSION

It is the opinion of this office that a person duly elected as a member of a board of directors of a six director school district may not have his right to exercise such office challenged by other members of such school board who would refuse to administer the oath of office to him until he presents a state and county tax receipt showing that he is a taxpaying citizen of the county.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General 

JLO'M/feh

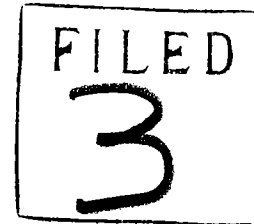
HIGHWAYS

} Right of way for county highway subject to easement
for electric lines and electric company. Must be
compensated for removing lines from right of way.

September 26, 1950

FILED NO. 3

Honorable Omer H. Avery
Prosecuting Attorney
Lincoln County
Troy, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Please give me any opinion your office has compiled concerning the right of R.E.A. co-operatives to use county highway rights of way, and rights of the County Court to regulate the use of same by REA.

"The condition in Lincoln County under present controversy is as follows: R.E.A. had a line of poles along the property line of a road and a few feet on the landowners. The County widened the right of way for purpose of a King Bill road, and acquired deeds to most of the additional right of way, and condemned three tracts. No R.E.A. leases or rights of way deeds appeared of record, and R.E.A. was not made a party to the suit. After construction of the road got under way R.E.A. was requested to move the poles required to be moved to complete the road and maintain it. Only the poles obstructing the roadway were requested moved. R.E.A. refuses to move them, and asserts that it acquired a right of way for its poles from private landowners but that it did not record

Honorable Omer H. Avery

the right of way deeds, nor does it intend to record them. R.E.A. claims that it is not required to record them but that the existence of their deeds to rights of way are made known to the world by reason of the fact that they have constructed poles and lines. It is my contention that by reason of the failure to record the deeds neither the County nor anybody else had notice of their existence. I might add that the County did not have actual notice of the existence of the deeds, nor has it yet received such notice, other than hearsay. No such deed has ever been presented to the County Court, to me, nor to anyone else interested.

"Now the County has constructed the King Bill Road, and the State Highway Department representative requires the moving of 36 REA poles before he will consider the road safe for travel and capable of maintenance. Hence state financial aid will not be forthcoming unless the poles are moved. The County has previously given REA by court order permission to use County rights of way for poles, which order provides that the poles 'shall not be so placed, constructed or maintained as to obstruct the use of roads or highways for travel, or as to interfere with their maintenance and repair.' It is further our contention that REA has violated this order in maintaining poles that obstruct use and maintenance of the roadway.

"Your reflections on these matters and advice concerning the rights of the county and the proper procedure will be greatly appreciated. As we have a November 15 date for compliance under King Bill, an early reply will be appreciated."

Honorable Omer H. Avery

The problem in the situation presented by you does not appear to involve the power of the county court with regard to permission to use highway rights of way by power companies. The question here presented is that of the effect of the acquisition by the county court of a right of way for highway purposes upon the rights of a power company which has constructed its lines upon land which was at the time of such construction privately owned and which was subsequently acquired by the county as a right of way for a highway.

To a considerable extent discussion of this problem depends upon the factual situation. We shall attempt to answer your question insofar as possible on the basis of the facts submitted. You state that the REA had obtained right-of-way deeds from the private landowners but had not placed such deeds of record. You do not state how long the power line had been erected. Presumably, however, the line and poles were present at the time the construction of the widened highway began. Although it does not appear from your letter, we presume that the lines and poles were also present when the proposed new right of way was laid out by the county highway engineer.

"One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement. The rule applies whether the sale is voluntary or involuntary. The rule that a purchaser with actual or constructive notice takes subject to easements has been applied to ways, stairways, drains, and various other easements.

* * * * *

"The law imputes to a purchaser such knowledge as he would have acquired by the exercise of ordinary diligence. Thus, where the easement is open and visible, the purchaser of the servient tenement will be charged with notice, although the easement was created by a grant which was never recorded. There

Honorable Omer H. Avery

should be such a connection between the use and the thing as to suggest to the purchaser that the one estate is servient to the other. The grantee is bound where a reasonably careful inspection of the premises would disclose the existence of the easement, or where the grantee has knowledge of facts sufficient to put a prudent buyer on inquiry. It is not necessary that the easement be in constant and uninterrupted use. The purchaser of property may assume that no easements are attached to the property purchased which are not of record except those which are open and visible." (28 C.J.S., Easements, Sections 48-49, Pages 711-714, Inclusive.)

In the case of Missouri Power and Light Company v. Thomas, 102 S.W. (2d) 564, the Supreme Court in considering a case involving an easement granted for the construction of a power line, where the deed creating the easement had been recorded, stated at l. c. 566:

"The burden was apparent and obvious and defendants must be presumed to have purchased the land with knowledge of the burden."

In the present situation the county must have obtained knowledge of the presence of the lines on the right of way when construction of the road was begun. Knowledge on the part of the county highway engineer undoubtedly existed at the time he surveyed the purposed new right of way. Under such circumstances we feel that the county would be charged with knowledge of the existence of the easements, although the deeds creating them had not been placed of record, and, therefore, the rights acquired by the county remained subject to the easements existing at the time of the county's acquisition of the right of way.

The situation is the same whether the right of way was acquired by voluntary conveyance or condemnation. The REA was not made a party to the condemnation proceedings. They possessed the right in the land for which they were entitled to compensation, and such right was not extinguished.

Honorable Omer H. Avery

In the case of Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas, 294 U.S. 613, 79 L. Ed. 1090, the Kansas Highway Commission had ordered the Panhandle Eastern Pipe Line Company to make specified changes in its transmission lines. Panhandle had acquired rights of way from private landowners and had constructed pipe lines and other facilities. Afterwards, the commission adopted plans for new highways over Panhandle's right of way in several places. Permission of the owners of the fee to use the necessary land was obtained, but Panhandle refused permission to use its right of way. Changes in the pipe line which the new highways would have necessitated would have cost approximately \$5,000.00. When Panhandle refused to make the changes, the highway commission ordered them to do so without compensation under a statute which provided in effect that whenever a pipe line was constructed along, upon or across a highway, its location was subject to control by the commission. The United States Supreme Court in that case held that the highway commission had no authority to make the order. The court in its opinion stated, 79 L. Ed. 1. c. 1095:

"If carried into effect, the challenged order of the Commission would result in taking private property for public use, * * * . A private right of way is an easement and is land. * * * No compensation was provided for; none was intended to be made. Ordinarily, at least, such taking is inhibited by the Fourteenth Amendment. * * *

"A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * *"

The court concluded at 79 L. Ed. 1097 as follows:

"The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect

Honorable Omer H. Avery

its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.
* * *

"As construed below, the challenged statute authorizes an arbitrary and unreasonable order by the State Highway Commission, whose enforcement would deprive appellant of rights guaranteed by the Federal Constitution."


CONCLUSION

Therefore, this department is of the opinion that where the county court acquires a right of way for the widening of a county highway and REA lines are present on the proposed new right of way, although the deeds for the easements to the REA are not of record, any acquisition by the county by either voluntary conveyance or condemnation of the highway right of way is subject to the easements held by the REA, and the REA may not be forced to remove its lines from the new highway right of way without being compensated therefor.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General



J. E. TAYLOR
Attorney General

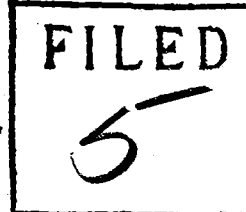
RRW/feh

TAXATION:

Intangible personal property. Interest accruing before January 1, 1945, and paid in 1947 and 1948 cannot be included in annual yield for latter years for intangible personal property tax assessments.

January 23, 1950.

Mr. G. H. Bates,
Director of Revenue,
Jefferson City, Missouri.



Dear Sir:

This department has before it your request for an opinion reading as follows:

"Recently several instances have arisen where individual taxpayers have collected interest which has accrued over a period of years. Our Department has been inclined to hold that the intangible tax, as provided for in Laws of Missouri, 1945, pages 1914 to 1919, inclusive, imposes the tax on the interest collected in any particular year, regardless of when said interest accrued.

"Several taxpayers, however, take the position that we cannot assess intangible tax on interest which accrued prior to 1945, but which was not paid until after the effective date of the Intangible Tax Act.

"Our question, therefore, is whether or not we can collect intangible tax on interest which accrued before January 1, 1945, even though paid in 1947 or 1948."

The intangible property tax act (Laws of Mo. 1945, p.1914) became effective on July 1, 1946, and as a new tax measure has not yet been before the courts of this state for interpretation. Prior to 1946 intangible personal property was classified, assessed and taxed in the same manner as other personal property. The Constitution of Missouri adopted in 1945 provided for classification of property for purposes of taxation in the following terms (Section 4 (a) Article X):

"* * * All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property.* * *"

Section 4 (b) of this Article provides in part:

"* * * Property in class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof."

Under authority of these constitutional provisions the General Assembly enacted the intangible personal property act, (Laws of Missouri, 1945, page 1914, * * in which sections 2 and 3 provided for the assessment of a tax for 1946 based on the yield for 1945 and sections 4 and 7 provided for the assessment of the tax after that year. For the purposes of this opinion the pertinent parts of that act include:

"Section 2: Except as otherwise provided by law, intangible personal property having a taxable situs in the State of Missouri on the first day of July, 1946, shall be subject to a property tax for the year 1946. Said tax on said intangible personal property shall be based on the yield of said property during the calendar year 1945, and the rate of said tax shall be four per cent (4%) of such yield. The person who on July 1, 1946, owned the legal title to or equitable title or beneficial interest in intangible personal property subject to this property tax thereon, shall be liable for said tax."

"Section 4: Except as otherwise provided by law, intangible personal property having a taxable situs in the State of Missouri at any time during the calendar year 1946 subsequent to the effective date of this act, or at any time during any calendar year subsequent to the calendar year 1946, shall be subject to a property tax for the calendar year following the year in which said property had such taxable situs in this state. Said tax on said intangible personal property for the year 1947 and each succeeding year shall be based on the yield of said property during the preceding calendar year, and the rate of tax shall be four per cent (4%) of such yield; provided, however, that any person whose total tax under the provisions of this section amounts to one dollar (\$1.00) or less shall not be required to file a return."

For the purposes of this act the term "yield" was defined in Laws of Missouri, 1945, page 1760, as follows:

"Section 1. The term 'yield' or 'annual yield' as used in any law heretofore enacted imposing a tax upon intangible personal property pursuant to Article 10, Section 4, of the Constitution of Missouri, shall mean the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state."

The question then to be determined is whether or not "yield" which has accrued prior to January 1, 1945, and which has been paid to the owner of the intangible property subsequent to the effective date of this taxing statute should be included as "yield" for the year in which the accruals are paid in arriving at the amount of the tax due; or whether the interest or "yield" which accrued prior to January 1, 1945, but was paid to the taxpayer subsequent to that date should not be included as a part of the "yield" as a basis for computing the tax.

In the absence of a clear expression by the legislature we must give the construction to the statute which best interprets the intention of the lawmakers as determined from the context of the statutes. In this connection, the St. Louis Court of Appeals said in *State v. Schwartzmann Service*, 40 S.W. (2d) 479:

"It is a cardinal rule, universally accepted, that, in the exposition of a statute, the intention of the lawmaker will prevail over the literal sense of the terms; its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from its context; from the occasion and necessity of the law; * * * and the intention is to be taken or presumed according to what is consonant with reason and good discretion. The object of all rational interpretation is to reach the true intent of the law-making authority, as expressed in the language it has employed to convey the thought. All other rules are subordinate to that great one. The chief canon of construction is that which requires us to find the legislative intent and purpose."

As pointed out supra, prior to 1946 the intangible personal property was taxed as other personal property. In 1946 this intangible personal property tax act provided a new method for assess-

ing intangible property and collecting the tax thereon. We do not believe the legislature intended to levy a tax based on the yield which had accrued to the owner of intangibles prior to 1945, but which has been paid subsequent to that date. In view of the fact that this type of property had been taxed under a different plan prior to 1946 the only logical conclusion to reach as the intention of the legislature is that the manner of assessment should be adopted and applied to yield accruing during and after 1945, rather than to base the assessment upon a "yield" which had accrued prior to the effective date of the new method of assessment and paid subsequently thereto.

It must be borne in mind that there is under consideration here an ad valorem tax - not an excise levy - with the "yield" of the property adopted as a measuring stick for determining the value to be used as a basis for assessment. That prior to the enactment of the present law the intangible was subjected to taxation based upon its actual value, rather than a value based upon its income-producing ability or "yield" as is now done. The logic for the adoption of such a plan is the fact that a definite relationship normally exists between yield and the value of the intangible subject to the tax. The legislature sought to levy this ad valorem tax based upon the actual value of the intangible and in doing so used a relationship which normally exists between actual value and "yield" or income-producing ability. The actual value of the intangible has not been changed by the fact that interest has accrued prior to 1945, but was paid subsequently to that time. Therefore, it seems that interest accruing prior to the enactment of the present method of assessment should not be included in fixing the present value, as such interest does not in fact bear any relationship to the actual value of the intangible. The inclusion of interest accrued during the period prior to the adoption of the present method of assessment in determining the present value of the intangible would in practical operation give the act a retrospective effect which it is not believed the legislature intended to do. The phrase "subsequent to the effective date of this act" was used repeatedly in adopting the manner in which this new method of assessment should be made. It is believed the legislature meant to apply this mode of assessing the value of the intangible to interest accruing after January 1, 1945. It might be noted that this method of assessment for taxation contemplates that income or something of value must actually have been received by the taxpayer. The language of the statute does not preclude inclusion of interest accruing after January 1, 1945, and paid in a later year as the basis of intangible tax for the year in which the interest was actually received. This is not inconsistent with the principle stated supra, that the yield accruing prior to the effective date of the act and paid thereafter should not be the basis for an assessment.

In order to effectuate the purposes of the Constitution and particularly to carry out the contemplated tax scheme several new tax measures were adopted by the General Assembly of 1945. It was the purpose of these acts to supplement and amend the method for

the assessment and collection of taxes but not to affect the liability of any taxpayer which had become fixed or determined at the time of the adoption of the new mode of assessment and collection. In this connection the court in dealing with the newly enacted bank tax act (Laws of Mo. 1945, page 1921) said in the case of 1st National Bank of St. Joseph v. Buchanan County, 356 Mo. 1204; 205 S.W. (2d) 726:

"* * * All taxes assessed, levied, due or owing prior to the adoption of this Constitution shall continue to be as valid as if this Constitution had not been adopted.' Schedule, Sec. 5, preserves the validity of any taxes assessed prior to the adoption of the Constitution * * *." The court further said, '*** It is our duty to harmonize all these enactments of the General Assembly with one another and with the Constitution and to effectuate all of them into the contemplated new tax pattern if possible.'"

The declared purpose in passing the intangible tax act (Section 16) is "to provide a property tax on intangible personal property." This act was passed as a part of a general scheme of taxation contemplated by the 1945 Constitution and insofar as possible the transition from the old method of assessment to the new pattern should be so harmonized as to provide uniformity and equality in the assessment and collection of taxes.

Section 3 of Article X, Constitution of Missouri, 1945, provides:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subjects within the territorial limits of the authority levying the tax.* * *"

Uniformity in taxation is required by our constitution and it is not to be presumed the General Assembly created a plan of tax assessment which would result in lack of uniformity, but it may be presumed the plan of tax assessment adopted was intended to result in uniformity.

In the case of City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W. (2d) 1040, 346 Mo. 762, the court in discussing the question of uniform taxation stated at l.c. 1042:

"* * * 'The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.' Head Money Cases, 112 U.S. 580, 594, 5 S.Ct. 247, 252, 28 L.Ed. 798, 802, speaking of Art. 1, Sec. 8, U.S.Const., reading '* * * all Duties, Imposts and Excises shall be uniform throughout the United States.'"

See State ex rel. v. Chicago, B. & Q.R. Co., Banc, 195 Mo. 228, 238, 93 S.W. 784, 786, 113 Am. St. Rep. 661. The word 'uniform' and the phrase 'same class of subjects' are not of identical legal effect in the clause 'They shall be uniform upon the same class of subjects' in Sec. 3, Art. 10, Mo. Const. 'Uniform' has reference to the measure, gauge or rate of the tax. 'Same class of subjects' has reference to the classification of the subjects of taxation for the purposes of the tax. Uniformity does not mean that the same rate must be levied upon all subjects, but when the subjects are once classified the rate must be uniform upon all subjects of the same class.* * *"

The intangible property owned prior to 1945 was assessed and taxed according to its actual value in the same manner as tangible personal property. If the owner of intangibles was required to pay a tax based on the actual value of intangibles owned in 1944 and prior years regardless of the fact that interest accrued thereon and was not paid until subsequently to January 1, 1945, and was then assessed again after 1945 when the interest was paid or yield realized from the ownership of the intangibles, as a practical matter that owner would pay a substantially greater tax than the taxpayer who had realized income or yield from intangibles in the years in which it accrued prior to 1944. Including the yield accrued prior to 1945 and paid subsequently thereto as a basis for assessment would in practical effect amount to double taxation when the same intangible had been assessed on its actual value under the old plan of assessment in effect. To allow the yield accrued prior to January 1, 1945, to be included as a basis for assessment when realized after January 1, 1945, would result in a taxpayer who received a yield which had accrued prior to 1945 paying as a practical matter a higher tax than another taxpayer who possesses identical intangible personal property, but who realized the interest as it accrued prior to 1945. It is our opinion the General Assembly did not intend and did not create in this law a plan which would result in such lack of uniformity as is prohibited by constitutional provision. Interest which accrues after the effective date of the intangible personal property act should, of course, be included in the yield for the year in which it is paid, as the act then operates uniformly in arriving at the valuation for tax purposes.

CONCLUSION.

It is the opinion of this Department that interest which has accrued before January 1, 1945, and which has been paid in

1947 and 1948 cannot be included in the "annual yield" upon which the intangible personal property tax assessment is based for the years of 1947 and 1948.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General



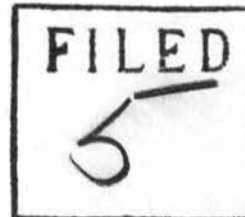
JEM/LD

SALES TAX: Director of Revenue shall not issue a certificate of title for any new or used motor vehicle subject to sales tax until the tax levied for the sale of the same has been paid.

March 22, 1950

3/23/50

Hon. G. H. Bates
Director of Revenue
State of Missouri
Jefferson City, Missouri



Dear Mr. Bates:

We have your recent letter requesting an official opinion of this department. Your opinion request reads in part as follows:

"We have recently had several conferences with parties financing automobiles with relation to the collection of tax where the original purchaser did not title the car in his name although he gave a mortgage to the finance company. Later he fails to make the necessary payments and it becomes necessary for the finance company to repossess the car, but in order to do so they must secure title in the name of the original purchaser in order that their mortgage will be valid.

"We have taken the position that we can not issue title where tax is due until said tax has been paid, whether by the original purchaser or the finance company. In other words, I have contended that their mortgage is void unless title is issued in the name of the original purchaser.

"On the other hand, the finance companies contend that they are the innocent parties and can not be held liable for tax owed by the other party."

Your opinion request presents the following question:

May the Director of Revenue, under the provisions of Section 11412, Laws of Missouri 1947, Vol 2, page 431 (Sec. 11412, Mo. R.S.A.) issue a certificate of title for any new or used motor vehicle

Hon. G. H. Bates

subject to sales tax when the tax levied for the sale of the same has not been paid?

Section 11412, Subsection (b) Laws of Missouri, 1947, Vol. 2, page 431, (Sec. 11412, Subsection (b) Mo. R.S.A.) provides for the collection of the sales tax on the purchase price of new or used motor vehicles and the issuance of a certificate of title for any new or used motor vehicle subject to the sales tax. Said section provides in part as follows:

"(b) That at the time the owner of any new or used motor vehicle which was acquired in a transaction subject to sales tax under the Missouri Sales Tax Act makes application to the Director of Revenue for an official certificate of title and the registration of said automobile as otherwise provided by law, he shall present to the Director of Revenue evidence satisfactory to said Director of Revenue showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle, or that no sales tax was incurred in its acquisition, and if sales tax was incurred in such acquisition, such applicant shall pay or cause to be paid to the Director of Revenue the sales tax provided by the Missouri Sales Tax Act in addition to the registration fees now or hereafter required according to law, and the Director of Revenue shall not issue a certificate of title for any new or used motor vehicle subject to sales tax as provided in said Missouri Sales Tax Act until the tax levied for the sale of the same under said Act has been paid as herein provided. * * * * *

(Underscoring ours)

The language of the above quoted provision is clear and definite on the following propositions:

Hon. G. H. Bates

1. That the owner of the motor vehicle and applicant for the certificate of title for said motor vehicle is liable for the payment of the said tax.
2. That the said tax shall be paid or caused to be paid by the owner at that time when the owner and applicant makes application for an official certificate of title and registration of said motor vehicle.
3. That the Director of Revenue is precluded from issuing a certificate of title for said motor vehicle until such time as the tax levied for the sale of the same has been paid.

It therefore follows that the Director of Revenue may not issue a certificate of title for any new or used motor vehicle subject to sales tax so long as there remains outstanding and due on such vehicle the sales tax levied for the sale of the same.

The contention of the finance companies, even if it were correct, could not serve to affect a release or excuse for the Director of Revenue from the duties expressly imposed upon the said Director by statute. We deem it sufficient, at this time, to state that the finance companies could pay the sales tax and recover such amount from the original purchaser. But these are private rights and liabilities personal to the purchasers and finance companies and should therefore be resolved by them in a separate and distinct transaction.

CONCLUSION

It is, therefore, the opinion of this department that the Director of Revenue may not, under the provisions of Section 11412, Laws of Missouri, 1947, Vol. 2, page 431 (Sec. 11412, Mo. R.S.A.) issue a certificate of title for any new or used motor vehicle subject to sales tax when the tax levied for the sale of the same has not been paid.

Respectfully submitted

PHILIP M. SESTRIC
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

PMS:A

ELECTIONS: A referred act becomes effective on the date
REFERENDUM: of its approval by the vote of the people.

March 27, 1950



Honorable G. H. Bates
Director of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

"The question has arisen in our department as to when H.C.S. for H.B. No. 185 would become effective should this proposition receive a favorable vote on April 4, 1950.

"In accordance with the decision rendered in the case of State ex rel. v. Commission, 318 Missouri 1004, 2 S.W. (2d) 796, I am ruling that 'A referred act becomes effective on the date of its approval by a vote of the people.'

"May I ask if your Department concurs in this ruling, and if not, please advise the date on which in your opinion the law would become legally effective."

Section 52, Article III, Constitution of Missouri, provides in part as follows:

"Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise."

March 27, 1950

In the case of State ex rel. v. Missouri Workmen's Compensation Commission, 2 S.W.2d 796, the Supreme Court handed down a decision as to the effective date of the Missouri Workmen's Compensation Act, which was referred to a vote of the people on November 2, 1926. The court quoted the statement of the case from the brief of counsel for the amicus curiae in that case, page 798, as follows:

"On November 2, 1926, at the biennial general election in Missouri, the electorate voted upon the Missouri Workmen's Compensation Law of 1925, which had been duly passed by the Legislature and approved by the Governor, and duly referred to the people under the provisions of section 57 of article 4 of the Missouri Constitution, and the provisions of chapter 47 of the Revised Statutes of Missouri 1919. On November 4, 1926, Marshall Elsas, while at work in the employ of the Montgomery Elevator Company at Kansas City, Mo., received injuries as a result of a fall from a ladder in an elevator shaft, from which he died on November 24th. Relator is his widow.

"On November 16, 1926, after a canvass of the official returns of the election and the certification of such canvass to the Governor of Missouri, by the secretary of state, in conformance with the provisions of section 5913, R. S. Mo. 1919, the Governor issued a proclamation declaring the law approved by the referendum held on November 2d."

"The Issue of Law in the Case.

"The question to be determined by this court is whether the Compensation Act became effective on November 2, 1926, the date of the referendum by which it was approved, or on November 16th, the date of the Governor's proclamation."

The court said, l.c. 801:

"The Constitution (section 57 of article

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4) in plain and unambiguous terms says just when a referred law shall go into effect. It says:

'Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise.'

"This statute (section 5913, R.S. 1919), relied upon by counsel, undertakes to make the date of the Governor's proclamation the effective date of the referred law. It undertakes to give force to the Governor's proclamation. In so far as this section undertakes to give the Governor, or any other person, the power to say when the referred law shall be the law of this state, it conflicts with the Constitution, and must fall.

"(9) That the lawmakers may fix a date for counting the votes, and a publication of the result by proclamation, is not questioned. This would not undertake to change the effective date of the referred law. Such would give to the public information of just what happened upon election day, but would not thwart the right to have the vote fix the effective date of the law, as plainly stated in the Constitution. Certain it is this constitutional provision confers no right upon the Governor to fix an effective date for a referred law.

"(10) Nor can we change the Constitution by mere force of our opinion, just because some hardships may be occasioned by following the Constitution. The Constitution may have made it hard upon a few litigants, where the accident occurred within a few days after the vote, but this is no reason to ask this court to rewrite the Constitution. Courts are not established for that purpose. The fixing of most any effective

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date might work some hardships."

It is to be noted that the provision of Section 57 of Article IV of the Constitution of Missouri, 1875, upon which the court based its decision, is substantially the same as the present provision found in Section 52, Article III, Constitution of Missouri, 1945, quoted supra.

It is, therefore, our view that the effective date of a referred law is the date upon which such law is approved by a majority of the votes cast on such measure.

CONCLUSION

It is the opinion of this department that an act referred to a vote of the people becomes effective on the date of its approval by a majority of the votes cast thereon.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MOTOR CARRIERS: (1) The word "route" as used in statutes relating to motor
PUBLIC SERVICE vehicles denotes the distance and direction of travel and
COMMISSION: direction of travel of the motor carrier from one point to
another and does not therefore denote the entire operating
authority of the said motor carrier. (2) Motor carrier cannot separate its
operating authority into various segments without the consent and permission
of the Public Service Commission. (3) Provision relating to a motor carrier
"operating a route in this state, the total mileage of which is not greater
than twenty miles" would apply only to intrastate operations.

FILED 5

April 1, 1950

Hon. G. H. Bates, Director
Department of Revenue
Jefferson City, Missouri



Dear Mr. Bates:

We have your recent letter requesting an official opinion of
this department. Said request raised the following questions:

- "1. Does the word "route" as used in Section 5728,
Laws of Missouri, 1943, mean the total mileage of
all the carrier's operating authority in Missouri?
- "2. Can a motor carrier, in order to avail itself
of these provisos, break its operating authority
into segments of various routes of less than ten
or twenty miles and license vehicles to operate
exclusively thereon?
- "3. Does the proviso relating to mileage limitations
in Section 5728, Laws of Mo. 1943, page 865 apply
only to intrastate operations?"

Questions embodied in your opinion request will be properly
numbered and will be set out at the beginning of the discussion
of their particular subject.

I.

Does the word "route" as used in Section 5728,
Laws of Mo. 1943, mean the total mileage of all
the carrier's operating authority in Missouri?

The primary rule of construction of statutes is to ascertain
and declare the intention of the Legislature, and carry such
intention into effect to the fullest degree. The rule in this
regard was stated and applied by the Supreme Court of Missouri
in the case of American Bridge Co. v. Smith, 179 S.W. (2d)
12, 1.c. 15, as follows:

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"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, * * * * *."

It is presumed that the Legislature intends to import the general and popular accepted meaning to any and all words used in the statutes unless a specific definition for the said word is provided within the statute concerned. The rule in this regard is stated in 50 Am. Jur., Statutes, Section 238, page 228, as follows:

"* * * * it is a general rule of statutory construction that words of a statute will be interpreted in their ordinary acceptance and significance and the meaning commonly attributed to them. The rule is that such words are to be given their natural, received, popular, approved and recognized meaning. The intention of the legislature to use statutory phraseology in such manner has been presumed."

To the same effect is the above quoted rule, see *State ex rel. Gass v. Gordon*, 266 Mo. 394, 181 S.W. 1016, and *Vable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

The word "route" is defined in Webster's Dictionary, Fifth Edition as "the course or way which is or is to be traveled." Substantially the same definition was applied to the word "route" in the case of *Virginia Stage Lines v. Commonwealth*, 45 S.E. (2d) 318, 1.c. 323, wherein the court held as follows:

"A 'route' is a direction of travel from one place to another. * * * * *"

In the case of *Consolidated Freightways v. United States*, C.C.A. N.D., 136 F (2d) 921, 1.c. 923 the court in discussing the significance of the word "route" as used in statutes providing for the regulation of motor carriers said:

"'Routes' as used in statutes regulating motor carriers signifies highways where motor vehicles operate and not areas between terminal points. * * * * *"

Inasmuch as the aforementioned authorities define the word "route" as being highways upon which motor vehicles operate and as a direction of travel from one point to another it seems clear that the word "route" as used in Section 5728, Laws of Missouri, 1943, page 865 means the distance and direction of

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travel of the motor carrier from one point to another and does not therefore mean the entire operating authority of the said motor carrier operating in the State of Missouri.

II.

Can a motor carrier, in order to avail itself of these provisos, break its operating authority into segments of various routes of less than ten or twenty miles and license vehicles to operate exclusively thereon?

Section 5723, Laws of Missouri 1935, page 321, (Sec. 5723 R.S. Mo. 1939, sub-section (c) provides as follows:

"All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided."

Section 1, Laws of Mo. 1947, Vol. 2, page 336 (Sec. 5630 Mo. R.S.A.) is a provision relating to the powers, duties authority and jurisdiction of the Public Service Commission over common carriers and provides in part as follows:

"* * * * The commission shall have power, after hearing, to issue such certificate, as prayed for, or to refuse to issue the same, or to issue it for the construction of a portion only of the contemplated railroad or street railroad or extension thereof or for the partial exercise only of said right or privilege, and may attach to the exercise of the rights granted by the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * * * *"

Reading and construing the two above quoted provisions together, it seems that the mode and manner in which the rights granted by the certificate of convenience and necessity are exercised is under the power, authority and jurisdiction of the Public Service Commission. To hold otherwise would be to strip the said Public Service Commission of any and all means it now has in its hands to enforce the law in respect to those agencies which are under the control and regulation of the said commission.

In the case of State ex rel Pitcairn et al v. Public Service Commission, 232 Mo. App. 755, 111 S.W. (2d) 982, the court

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in discussing the powers and authority of the Public Service Commission said, l.c. 986:

"The purpose of the Legislature was to promote the welfare of the state by regulating common carriers by motor vehicle. * * * * It authorized the Public Service Commission to administer the law as its agent. Lusk v. Atkinson, 268 Mo. 109, 186 S.W. 703. It thereby vested the commission with certain positive, powers, expressly conferred and also vested it with all others necessary and proper to carry out fully and effectually all such powers so delegated, and necessary to give full effect to the act. * * * *"

Hence it must follow that the terms and conditions, as prescribed by the commission, under which the rights granted by the certificate may be exercised are binding upon the recipient of the certificate and cannot be altered or amended without the permission and authorization of the Commission.

It is, therefore, the opinion of this department that a motor carrier cannot separate its operating authority, as established by the commission, into segments of various routes for the purpose of creating and maintaining the said various routes as distinct and separate routes for the purpose of having his vehicles licensed as operating exclusively on the shortened routes.

III.

Does the proviso relating to mileage limitations in Section 5728, Laws of Missouri 1943, page 865 apply only to intrastate operation?

The provision contained in Section 5728, Laws of Missouri 1943, page 865 is as follows:

"Provided further, that where a motor carrier is operating a route in this State, the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee hereinafter set out."

The above quoted provision must be construed and applied in compliance with the intent of the Legislature from the words and phrases used in the said provision and in the sense that

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the legislature intended the words and phrases to be used.
See American Bridge Co. v. Smith, Supra.

Section 655, R. S. Mo. A., 1939 provides in part as follows:

"The construction of all statutes of this State shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute:
First, words and phrases shall be taken in their plain or ordinary and usual sense,
* * * * *"

To the same effect as the above quoted provision, see 50 Am. Jur. Statutes, Section 238, page 228; State ex rel Gass v. Gordon, 266 Mo. 394, 181 S.W. 1016; and Vable v. McCune, 26 Mo. 371, 72 Am. Dec. 214.

In view of the foregoing authorities and statute, and the fact that the legislature has deemed it necessary to provide separately in another provision of Section 5728, Laws of Mo. 1943, page 865, for the license fee of motor carriers not operating wholly within the confines and boundaries of the state, it must follow that the legislature intended the afore quoted provision to apply only to intrastate operations.

CONCLUSION

It is therefore, the opinion of this department that the word "route" as used in Section 5728, Laws of Missouri 1943, page 65, means the distance and direction of motor carrier from one point to another and does not therefore mean, nor is it synonymous with entire operating authority of the said motor carrier operating in the State of Missouri under a permit from the public Service Commission. It is further the opinion of this department that a motor carrier cannot separate his operating authority as established by the Commission into various routes as distinct and separate routes for the purpose of having his vehicles licensed as operating exclusively on the shortened routes.

It is also the opinion of this department that the mileage provision contained in Section 5728, Laws of Missouri, 1943, page 865, applies only to intrastate operations.

Respectfully submitted

PHILIP M. SESTRIC
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

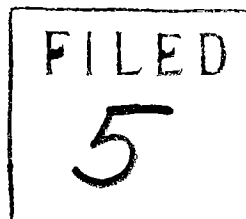
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**BRIDGES;
DAMAGES TO PUBLIC
HIGHWAYS OR BRIDGES:**

Any person who shall wilfully or negligently damage a highway or bridge upon a public highway is liable for the amount of such damage and the same may be recovered in the name of the state by the municipality, county or other civil subdivision of the state suffering the loss.

August 29, 1950

Honorable Emmett L. Bartram
Prosecuting Attorney
Nodaway County
Maryville, Missouri



Dear Sir:

I.

We have received your request for an official opinion on the question of the liability of a truck owner for damage to a county bridge. Your letter is as follows:

"Nodaway County has suffered large losses to their bridges by dump trucks hauling heavy loads of rock and tractors pulling lowboy trailers loaded with heavy machinery breaking down the bridges when they cross.

"Recently, a merchant in an adjoining county had his men load a caterpillar bulldozer onto a lowboy attached to a tractor to bring this equipment into Nodaway County. They were almost across this particular bridge when it broke under the weight of the lowboy with the caterpillar bulldozer on it and let it slide down into the river. The tractor part was almost across the bridge, but it really broke under the weight of the lowboy and the bulldozer.

"This will cause the county to have to put a new bridge across this stream and a new bridge will cost our county, under the present cost of things, possibly \$6000.00. The bridge, of course was old, but would have served ordinary purposes for a number of years yet.

"The tractor and lowboy and the load were within the weights permitted under the Statute, as we construe it; that is, the total length was 36 feet and under the

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calculation, 36 plus 40 would be 76; this times 700 would make 53,200. The total weight of this tractor, lowboy and the load was 42,000. The bridge was built for a 7 ton capacity with a 50% over manufacturer's guarantee on it, which would give the bridge a 10½ ton capacity.

"This bridge was not posted by the county as to the load limit and these people had crossed this same bridge with the same load several times before.

"Our question is, is this merchant, whose machinery and equipment went through the bridge, liable for damages to our county for the loss of this bridge under the foregoing statement of facts? I am wondering how far Section 8591 R. S. Mo. would apply in this case, where really the weight of the lowboy was what broke the bridge instead of the gasoline tractor. Of course, the tractor was attached to and pulling the loaded lowboy, but I am afraid that this section is not broad enough to cover our case."

II.

Section 304.11, R. S. Mo. 1949, S.R.B. No. 1113, 65th General Assembly, provides as follows:

"1. No motor drawn or propelled vehicle, or combinations thereof, shall be moved or operated on the highways of this state when the gross weight thereof, in pounds shall exceed the weight computed by multiplying the distance in feet between the first and last axles of such vehicles or combinations of such vehicles plus forty by seven hundred; nor shall the total gross weight, with load on any group of axles of a vehicle or combination of vehicles where the distance between the first and last axles of the group is eighteen feet or less exceed the weight, in pounds, computed by multiplying the distance in feet between the first and last axles of

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such group under consideration plus forty by six hundred fifty. No vehicle or combination of vehicles shall be moved or operated on any highway in this state having a greater weight than sixteen thousand pounds on one axle when the wheels attached to said axle are equipped with high pressure pneumatic, solid rubber or cushioned tires, and no vehicle or combination of vehicles shall be moved or operated on the highways of this state having a greater weight than eighteen thousand pounds on one axle when the wheels attached to said axle are equipped with low pressure pneumatic tires, and no vehicle shall be moved or operated on the highways of this state having a load of over six hundred pounds per inch width of tire upon any wheel concentrated on the surface of the highway, the width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim.

"2. For the purpose of this section an 'axle load' shall be defined as the total load imposed upon the highway through all wheels whose centers are included within two parallel transverse vertical planes not more than forty inches apart."

It is not clear to us that your total length of 36 feet as stated in your letter was measured from the first axle to the last axle. If the vehicle is available to be measured, then the sheriff or some member of the Missouri Highway Patrol should measure the vehicle involved and also determine whether or not there was more than 16,000 pounds on one axle. If the truck owner or operator has violated this section, it could be used as one allegation of negligence. The criminal aspects of such a violation are not considered in this opinion.

Section 304.18, R. S. Mo. 1949, S.R.B. No. 1113, 65th General Assembly, provides as follows:

"1. No metal tired vehicle shall be operated over any of the improved highways of this state, except over highways constructed of gravel or clay bound gravel, if such vehicle has on the periphery of any of the road wheels any lug, flange, cleat, ridge, bolt or any

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projection of metal or wood which projects radially beyond the tread or traffic surface of the tire, unless the highway is protected by putting down solid planks or other suitable material, or by attachments to the wheels so as to prevent such vehicles from damaging the highway, except that this prohibition shall not apply to tractors or traction engines equipped with what is known as caterpillar treads, when such caterpillar does not contain any projection of any kind likely to injure the surface of the road. Tractors, traction engines and similar vehicles may be operated which have upon their road wheels 'V' shaped, diagonal or other cleats arranged in such manner as to be continuously in contact with the road surface if the gross weight on the wheels per inch of width of such cleats or road surface, when measured in the direction of the axle of the vehicle, does not exceed eight hundred pounds.

"2. No tractor, tractor engine, or other metal tired vehicle weighing more than four tons, including the weight of the vehicle and its load, shall drive onto, upon or over the edge of any improved highway without protecting such edge by putting down solid planks or other suitable material to prevent such vehicle from breaking off the edges of the pavement.

"3. Any person violating this section, whether operating under a permit or not, or who shall wilfully or negligently damage a highway, shall be liable for the amount of such damage caused to any highway, bridge, culvert or sewer, and any vehicle causing such damage shall be subject to a lien for the full amount of such damage, which lien shall not be superior to any duly recorded or filed chattel mortgage or other lien previously attached to such vehicle; the amount of such damage may be recovered in any action in any court of competent jurisdiction, in the name of the state, by the municipality, county or other civil subdivision or interested party."

(Underscoring ours.)

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This section provides that any person violating this section, or who shall wilfully or negligently damage a highway, shall be liable for the amount of such damage caused to any highway bridge, etc. We believe that the clause "or who shall wilfully or negligently damage a highway" applies to any and all damage inflicted upon the public highways regardless of whether or not any violation of this particular section has been involved. We believe that it is a general statutory liability enactment, and by reason of the provisions of this section that it would be unnecessary for you to rely upon the provision of Section 8591, R. S. Mo. 1939.

Section 8591, R. S. Mo. 1939, which will be Section 229.16, R. S. Mo. 1949, provides as follows:

"All persons owning, controlling or managing threshing machines, sawmills and steam engines or gasoline tractors are required, in moving the same over public highways, to lay down planks not less than one foot wide and three inches in thickness on the floors of all bridges situate on the public highways, while crossing the same with such threshing machines, sawmills, steam engines or gasoline tractors, and in the event any person owning any such machinery shall cross or attempt to cross any bridge upon any public highway with such machinery who shall neglect or fail to lay down said planks as a protection to said bridge and who shall, by reason of such neglect cause injury to any such bridge, he shall be liable for double the amount of such injury to be recovered in the name of the county or any subdivision thereof, to the use and benefit of the road and bridge fund."

The term "gasoline tractor" may only refer to farm tractors. In 1921, when this section was enacted to include gasoline tractors, all farm tractors used either steel wheels with lugs or steel caterpillar tread. But the section does not specify the type of gasoline tractors that would be required to comply with the provisions of this section. Today we have automobile tractors that pull trailers. Such tractors use either diesel fuel or gasoline. We understand the weight of the heavy load caused the bridge to collapse. Section 8591 was enacted to protect the floors of bridges from the steel lugs or tread on steam engines or gasoline tractors. Would the planking of your bridge, as required by this section, have prevented the same

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from collapsing? If so, then the failure to do so would be negligence, but not a violation of said Section 8591 in our opinion.

We wish to call your attention to the case of State Highway Commission v. Stadler, 148 P. (2d) 296. This case involved a suit by the Kansas State Highway Commission to recover damages for the destruction of a bridge on a public highway. The court in this case said:

" * * * In 1929 the legislature enacted Laws of 1929, Ch. 84, Sec. 5, which reads: 'Any person who shall wilfully or negligently damage a highway shall be liable for the amount of such damage and the state highway commission may prosecute claims or suits for the amount of such damage.' Certainly after the enactment of this statute it must be conceded whatever common law cause of action existed in favor of a governmental agency for negligent destruction of its highway, and it must go unquestioned that a bridge is a portion of the highway. Board of Com'rs of Cloud County v. Mitchell County, 75 Kan. 750, 757, 90 P. 286; G. S. 1935, 77-201 (5) and G. S. 1941 Supp. 8-126(e) was superseded by the new statutory cause of action for negligence provided for therein. Later, the legislature passed Laws of 1931, Ch. 244, Sec. 7, prohibiting the overloading of bridges and imposing civil liability for violations of its provisions recoverable by the authorities charged with the maintenance of highway structures. This statute was in no sense a limitation of the negligence statute theretofore enacted and merely imposed an additional liability on users of the highway in cases where they used such structures when their vehicles were loaded in excess of the weight allowed by its provisions. In 1937 both of the statutory enactments just referred to were repealed by Laws of 1937, Ch. 283, known as the Uniform Act Regulating Traffic on the Highways, and substituted in their place was section 124, now G. S. 1943 Supp. 8-5, 124, which reads:

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"(a) Any person driving any vehicle, object, or contrivance upon any highway or highway structure shall be liable for all damage which said highway or structure may sustain as a result of any illegal operation, driving, or moving of such vehicle, object, or contrivance, or as a result of operation, driving, or moving any vehicle, object, or contrivance weighing in excess of the maximum weight in this act but authorized by special permit issued as provided in this act. (b) Whenever such driver is not the owner of such vehicle, object, or contrivance, but is so operating, driving, or moving the same with the express or implied permission of said owner, then said owner and driver shall be jointly and severally liable for any such damage. (c) Such damage may be recovered in a civil action brought by the authorities in control of such highways or highway structure."

"(2,3) The language of this new statute is broad and comprehensive. On analysis, it can be said it permits the commission to sue in its own name and recover all damages which the highway and/or structure may sustain as a result of overloading and/or any illegal operation, driving or moving of any vehicle, object or contrivance driven upon the highway. Appellant argues its provisions do not contemplate negligence and that the only basis for recovery thereunder is overloading. Here again appellant's position is not well taken. True enough, the terms of the new act do not specifically impose liability for negligence nor is the word 'negligence' to be found in the language used therein. But that is no justification for a claim that negligence was not contemplated by its provisions. The language 'illegal operation, driving, or moving of such vehicle, object, or contrivance' not only contemplates acts of negligence but embraces in its terms so many negligent acts that it is difficult to imagine any illegal operation of a vehicle on the highway which would not constitute negligent operation of

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such vehicle if injury to the highway resulted, and rare indeed would be the occasion where negligent operation of such vehicle would not be illegal. For illustration, the acts alleged and relied on by the plaintiff in its petition as constituting common law negligence were all illegal under the present act, namely, driving the truck on the wrong side of the highway, see, G. S. 1943 Supp. 8-537, driving at a rate of speed greater than reasonable and proper, see, G. S. 1943 Supp. 8-532, driving at a reckless rate of speed, see, G. S. 1943 Supp. 8-531. It should be added the commission of one or all of such acts if established by the evidence was sufficient to authorize the recovery of damages under its provisions. We have no difficulty in concluding that the present statute was intended to be all inclusive and embraces within its terms all the acts for which the driver or owner of a vehicle might be civilly liable to the commission in the event while driving on the highway he damages a highway or highway structure. The common law right of action has been superseded by the statutory one and so far as acts of negligence are concerned the commission's right of action is limited to such negligent acts as amount to illegal acts under the provisions of the Uniform Act Regulating Traffic on the highways. Common law negligence may now give rise to the statutory cause of action if the act relied on is illegal but it no longer gives appellant the right to rely upon a common law cause of action for negligence. It follows the trial court's finding the appellant was limited to the relief authorized by the statute and was not entitled to recover anything other than provided for therein was proper.

" * * * Relating to highways 25 Am. Jur. 637 Sec. 341, states the general rule to be as follows: 'The damages recoverable are measured by the expense to which the municipality or other public agency has been put by the act of the defendant and do not include mere inconveniences in the use of the road which do not make it more expensive to be kept in repair.'

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"With respect to bridges the rule stated in 11 C.J.S., Bridges, p. 1137, Sec. 100, reads: 'It has been held that the measure of damages for injury to a bridge is usually the amount which must necessarily be expended in repairing or restoring it, but in some jurisdictions the party is, by statute, liable to greater damages, as will appear from an examination of statutory provisions and the decisions cited infra this note. * * *'

"While in 8 Am. Jur. 973, Sec. 84, it is stated thus: 'The measure of damages to the owner of the damaged bridge is the cost of repairs necessitated by the injury received, together with a reasonable sum, in case of a toll bridge, for the loss of net profits during the time the bridge cannot be used. Additional costs, however, due to delay or other action by the owner cannot be recovered in such a case.'

* * * * *

" * * * We have determined without must perturbation, irrespective of what the rule may be elsewhere, that under our present statute which imposes liability for all damage which a highway and/or highway structure may sustain, the proper measure of damages is the actual cost of replacement of such highway and structure in the condition it was in at the time the injury occurred."

(Underscoring ours.)

The above quotations from this Kansas case should be beneficial to you in construing the provision of said S.R.B. No. 1113, quoted above. We believe that this case clearly shows that the appellate courts of this state would construe said liability statute, quoted above, to include the damage inflicted upon the bridge described in your letter.

Another case upon this question is Department of Highways v. Fogleman, 27 So. (2d) 155, 210 La. 375, in which the Supreme Court of Louisiana states:

"(1,2) It is incumbent upon every citizen using the highways and public bridges to do so with reasonable care. The general

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rule that a traveler about to cross a public bridge may assume that it is strong enough for his purpose does not apply when he proposes to cross with an 'unusual load'. Nelson v. City of Rockford, 186 Ill. App. 288; Board of Com'rs of Allen County v. Creviston, 133 Ind. 39, 32 N.E. 735. See, also, 68 A.L.R. 605 et seq. It would be a desirable situation if all of the highway bridges could hold up the maximum loads permitted but, in Louisiana, we are faced with the fact that many of our bridges were built before the transportation of such loads were usual or even contemplated. Many of these bridges still serve their original purpose in their respective communities particularly in the transportation of passenger and other light vehicles. One who proposes to transport an unusual or undue load over a public bridge, particularly on a secondary route, is under the duty to exercise care and caution. In the absence of such care, a person driving such vehicle assumes the risk of injury to himself and cargo in trying to pass over the bridge. Wilson v. Grandy, 47 Conn. 59, 36 Am. Rep. 51; Clapp v. Ellington, 51 Hun. 58, 3 N.Y.S. 516; Carter v. Town of Minden, 156 La. 382, 100 So. 336."

(Underscoring ours.)

A case decided upon the general law of negligency or common law without the benefit of statutory provision is the case of Township of Livingston v. Parkhurst, 7 A. (2d) 627, 122 N.J.L. 598, in which the Supreme Court of New Jersey said:

"The question presented on this appeal is the propriety of the action of the trial court in granting a nonsuit. From the agreed state of case it appears that on September 23, 1938, the defendant Brown was transporting over the public streets of the Township of Livingston, appellant, a truck and trailer attached thereto belonging to his employer, the defendant Parkhurst, who accompanied him. A small wooden bridge over a stream on Brookside Avenue was used by these vehicles and collapsed under their weight. The truck weighed from

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three to three and one-half tons and the trailer from four to five tons. On the trailer was a gasoline shovel weighing from twenty-eight to thirty tons. The truck and the front wheels of the trailer had safely crossed over. The rear wheels of the trailer had crashed through the planking of the bridge. There was no sign posted at the bridge indicating the limit of the weight the bridge would carry. Two days prior there had been a severe rainstorm causing the stream to overflow the bridge. For that reason the bridge had been closed to traffic until the morning of the day in question when the waters having subsided and the planks of the bridge having, upon inspection by the Township Engineer, been found 'dried out' the bridge was opened to use.

"The bridge was substantially and fairly well constructed and in good condition. The usual traffic consisted of pleasure vehicles and delivery trucks, the heaviest trucks generally using the bridge being coal trucks. This was the first load the bridge had failed to carry safely. The bridge had been built in 1925, acquired by the municipality in 1927 or 1928 and since then maintained by it. The maximum safe load capacity of the bridge even if composed of entirely new lumber would not exceed fifteen tons and at the time of the accident somewhat less. Defendant Parkhurst told the Township Engineer at the scene of the accident, shortly thereafter, that he and his driver, defendant Brown, had inspected the bridge, even looked underneath it, before attempting to cross, but later in the day he denied to the engineer having made such examination or inspection, then stating that he had driven over it because it looked alright.

"It is, of course, not disputed that this bridge and highway leading to it were for the use of the public who had an easement in it. The defendants had a right to its use for the transportation of this equipment. But in doing so they were under a duty to the plaintiff to use reasonable care so as not to cause damage to the highway or

Honorable Emmett L. Bartram


bridge. The highway was unpaved, and the bridge, a small one, was constructed of wood. Would one owing a duty to the municipality to use the facilities it provided with reasonable care be violating that duty by the transportation of equipment of the type and weight described along this highway and over this bridge? Were proper precautions taken in the exercise of due care? Was there, on the other hand, any duty on the part of the municipality which was contributory negligence as a matter of law under these facts?

"(2,3) It seems to us that these questions of fact, both as to negligence and as to contributory negligence, were clearly raised by the proofs and that it was error for the court to treat them as questions of law."

CONCLUSION

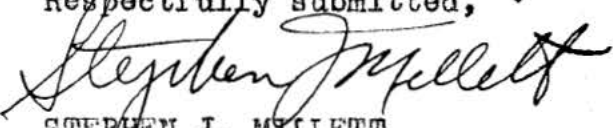
It is the opinion of this department that any person who shall wilfully or negligently damage a highway or bridge upon a public highway is liable for the amount of such damage and that the same may be recovered in the name of the state by the municipality, county or other civil subdivision of the state. It is the further opinion of this department that double damages may be recovered for damage to any bridge on a public highway caused by a violation of the provisions of Section 8591, R. S. Mo. 1939. Whether or not the facts stated in your letter would constitute negligence would be a question of fact to be determined by the court and jury.

APPROVED:


J. E. TAYLOR
Attorney General

SJM:VLM

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

MAGISTRATE COURTS: County superintendent of schools as school attendance officer may file complaint in
SCHOOLS: magistrate court to enforce compulsory school attendance of children; magistrate court has jurisdiction to hear such cases arising out of prosecution for failure to comply with school attendance law.

March 3, 1950

OPINION NO. 7

Honorable Joe Berry
Judge of the Probate and
Magistrate Courts
Benton County
Warsaw, Missouri



Dear Sir:

Your letter at hand requesting to be advised by this department, which reads as follows:

"Does the Magistrate Judge have proper jurisdiction over compulsory attendance according to the Missouri school law?

"May a County Supt., as a compulsory attendance officer, file a complaint in the Magistrate Court against the parents or guardians of a person not in regular attendance at school?"

Regarding the compulsory attendance of children in school, Section 10587, R.S. Mo. 1939, in part, provides:

"Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and fourteen years shall cause such child to attend regularly some day school, public, private, parochial or parish, not less than the entire time the school which said child attends is in session, or shall provide such child at home with such regular daily instruction during the usual hours as shall, in the judgment of a court of competent jurisdiction, be substantially equivalent at least to the instruction given the children of like age at said day school in the locality in which said child resides; and every parent or person in this

Honorable Joe Berry

state having charge, control or custody of a child between the ages of fourteen and sixteen years, who is not actually and regularly and lawfully engaged for at least six hours each day in some useful employment or service, shall cause said child to attend regularly some day school as aforesaid: * * *

Section 10589, R. S. Mo. 1939, provides that the county superintendent of schools in each county shall act as school attendance officer and shall have the power of a deputy sheriff in the performance of the duties of school attendance officer in all school districts of the county. Provision is also made for the appointment of other school attendance officers.

Section 10591, R.S. Mo. 1939, provides for the county attendance officer acting as a prosecuting officer, and, in part, reads:

"* * * The county superintendent shall immediately have an investigation made by his county school attendance officer, and any parent or guardian or person who, having charge, control or custody of any child between the ages of seven and sixteen years, violates any provision of sections 10587 to 10594, shall be warned by said officer as soon as possible after the beginning of the public school term of the district in which such child resides and also at any time thereafter to place and keep said child in regular attendance at some day school within three days from the service of said written or printed notice, after the lapse of three days from the date of the service of said notice of warning, said parent or guardian or person having charge, control or custody of any such child shall be deemed guilty of a misdemeanor, and said school attendance officer shall make complaint against said parent, guardian or other person in charge of such child before the judge of the juvenile division of the circuit court or before a justice of the peace in the county where the party resides for refusal or neglect to send such child or children to school; said judge or justice shall issue

Honorable Joe Berry

a warrant upon said complaint, returnable forthwith, and upon the appearance of the defendant, shall proceed to hear and determine the same in the same manner as is provided by the statutes for other cases under his jurisdiction, and upon conviction of violation of the aforesaid sections said parent, guardian or other person having control or custody of such child shall pay a fine of not less than ten dollars and not more than twenty-five dollars, or to be imprisoned for not less than two days and not more than ten days, or by both such fine and imprisonment: Provided, that said sentence of fine or imprisonment, or both, may be suspended and finally remitted by the court, with or without the payment of costs, at the discretion of the court, if the said child be immediately placed and kept in regular attendance in some day school as aforesaid, and if such fact of regular attendance is proven subsequently to the satisfaction of said court by a properly attested certificate of attendance by the superintendent, principal or person in charge of said day school."

The above section clearly provides that the county attendance officer after giving due warning and notice to parents, guardians or persons having custody of children between the ages of seven and sixteen years who violate the provisions of Section 10587, supra, shall make complaint against said parent, guardian or other person in charge of said children before the judge of the juvenile division of the circuit court or before a justice of the peace in the county where the party or parties reside.

Relating to prosecutions for violations of the provisions of Section 10587, supra, Section 10595, R.S. Mo. 1939, provides as follows:

"Prosecutions under sections 10587 to 10594 shall be brought in the name of the state of Missouri. The circuit court shall have concurrent jurisdiction with the court having general jurisdiction over misdemeanors to try and determine any cases of violation of the provisions of said sections and shall also

Honorable Joe Berry

have jurisdiction to determine exemptions under section 10588 and a general supervisory jurisdiction over the enforcement of the provisions of said sections."

We note that Section 10591, supra, confers jurisdiction on the justice of the peace to proceed, hear and determine cases against the parent, guardian or other person having control or custody of a child between the ages of seven and sixteen who is charged with violating the provisions of Section 10587, supra. We believe that this would also confer jurisdiction upon the magistrate courts, for Section 20, Article V of the Constitution of 1945, provides as follows:

"Until otherwise provided by law consistent with this Constitution, the practice, procedure, administration and jurisdiction of magistrate courts, and appeals therefrom, shall be as now provided by law for justices of the peace; and in counties of less than seventy thousand inhabitants magistrate courts shall have concurrent juvenile jurisdiction with the circuit court, and the powers of the circuit judge in chambers when the circuit judge is absent from the county."

The above constitutional provision also confers upon magistrate courts concurrent juvenile jurisdiction with the circuit court in counties of less than 70,000 inhabitants, as well as providing that the jurisdiction of magistrate courts shall be as now provided by law for justices of the peace.

Section 10595, supra, relating to prosecutions and conferring jurisdiction, lodges jurisdiction in the circuit court and in courts having general jurisdiction over misdemeanors.

Section 3856.1, Mo. R.S.A., relating to the jurisdiction of magistrate courts, provides that "Magistrates shall have concurrent original jurisdiction with the circuit court, coextensive with their respective counties in all cases of misdemeanor." Consequently, prosecutions for violations under Section 10587, supra, could be brought in the magistrate court, and the magistrate court would have jurisdiction to hear, try and determine such cases.

Honorable Joe Berry

CONCLUSION

It is, therefore, the opinion of this office that the county superintendent of schools as the school attendance officer may file complaints in the magistrate court against the parents, guardians or other persons having custody of children between the ages of seven and sixteen years for failure to cause said children to be in regular attendance at some day school, as provided by law. It is further the opinion of this department that the magistrate court has jurisdiction over cases arising out of prosecution of said parents, guardians or other persons having custody of such children.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

TAXATION:
EXEMPTIONS:

Tillable land owned by a church and farmed by members thereof not exempt from taxation even though proceeds therefrom are used for paying operating costs of church.

January 11, 1950



Honorable Ted A. Bollinger
Prosecuting Attorney
Shelbyville, Missouri

Dear Mr. Bollinger:

This is in reply to your recent letter wherein you submitted the following statement request:

"An opinion is requested of your office as to whether real property owned by a church is exempt from tax when such land consists of 60 acres of tillable land which is farmed by the members of the church. The proceeds from this farm are then used to pay the salary of the preacher and for upkeep of the church building."

If the property is exempt from taxation, it must be under the provisions of Article X, Section 6 of the 1945 Constitution of Missouri, or Section 5, Laws of Missouri, 1945, p. 1800.

Article X, Section 6 of the Constitution reads as follows:

"All the property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools, and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 5, Laws of Missouri, 1945, p. 1800, reads in part as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes:
* * * Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges,

or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

The particular words of Article X, Section 6 of the Constitution with which we are most concerned are: "* * * all property, real and personal, not held for private or corporate profit and used exclusively for religious worship may be exempted from taxation by general law."

For our purposes, the pertinent portion of Section 5, Laws of Missouri, 1945, supra, is as follows: "* * * all property, real and personal actually and regularly used exclusively for religious worship * * *, or for purposes purely charitable * * * shall be exempted from taxation * * *; provided, however, that the exemption herein granted shall not include real property * * * held or used as investment even though the income or rentals received therefrom be used wholly for religious * * * purposes." (Emphasis ours).

You state the land in question was used by members of the church for farming purposes; that the income realized from the operation of the farm is used to defray the expenses incurred in the operation of the church. In order to claim this exemption the statute requires the land be used regularly and exclusively for religious worship, however, if the land is held for the purpose of producing income, no matter to what purpose said income is applied, the tax exemption could not be claimed. It is obvious the land is used for producing income. While the entire income from the land is used for the worthy purposes of the organization its property is not so used exclusively for religious purposes, but a part thereof is used for purposes not incident to nor part of religion or charity. Therein lies a distinction expressed by the Supreme Court of Missouri in the case of Evangelical Lutheran Synod, etc. v. Hoehn, 196 S.W. (2d) 134, l.c. 143:

"The prerequisites to tax exemption were: (1) the use of the land itself, not merely its usufruct, for those exclusive purposes;"

Our Supreme Court in the case of Y.M.C.A. v. Baumann, 130 S.W. (2d) 499, l.c. 501 said:

"* * * the proof showed that a portion of the (Y.M.C.A.) Association's building was leased to others for commercial purposes. We denied exemption because the property itself was not used 'exclusively' for educational and religious purposes, and further held that it was immaterial that the income from the property was so used."
(Emphasis ours).

This office has on several occasions had some variation of this question before it for opinion and has uniformly held that if the property has been used to produce income, that it is no longer being used exclusively for religious worship or charitable purposes, even though the income derived therefrom is devoted to such purposes.

A tax exemption is allowed on real property used regularly and exclusively for religious worship or for purely charitable purposes. Land which is used for income producing purposes is not in regular use for the aforesaid purposes. Both, by court decision and by statute, the law of this state is that the devotion of the entire income, derived from the use of the land for farming, to religious or charitable purposes will not bring such property within the exemption statute.

We are fully cognizant, as everyone must be, of the unselfish work done by the membership of this church, and many other similar groups of spiritually dedicated men and women, and we believe that every encouragement should be given to their efforts; however, even as the land of others more materially minded is taxed within the law, as the law is written, so must this land be taxed according to the law.

CONCLUSION

It is the opinion of this Department that the real property owned by a church is not exempt from taxation when such land is farmed by the members of the church, notwithstanding that fact that the income derived from such use is devoted wholly to expenses incurred in the operation of the church.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTION
BOARD OF ELECTION
COMMISSIONERS,
KANSAS CITY,
MISSOURI:

Board of Election Commissioners of city of
300,000 to 700,000 may consolidate two or more
precincts, dispense with clerk's canvass and
the printing of registration lists for special
referendum election April 4, 1950.

February 18, 1950

FILED
10

Board of Election Commissioners
Kansas City, Missouri

Attention Mr. Elmo B. Hunter and Mr. W. Raymond Hedrick,
Attorneys

Gentlemen:

This is in answer to your letter of recent date request-
ing an official opinion of this office, reading as follows:

"The Board of Election Commissioners of
Kansas City, Missouri request an opinion
on the following questions under Section
12097 A, general laws regulating elections,
Chapter 76, Article 23, Election Laws,
State of Missouri, as revised for 1947-
1948.

"1. Can the Board of Election Commissioners
legally consolidate two or more precincts
and use one set of judges and clerks in such
consolidated voting area, and dispense with
a clerk canvass and the printing of regis-
tration lists for the special constitutional
amendment election to be held April 4, 1950
concerning the proposed increase in the
gasoline tax?"

We call your attention to the fact that the election to
be held April 4, 1950, is not a special constitutional amend-
ment election, but is a special election for referring to the
people for their approval or rejection House Committee Sub-
stitute for House Bill No. 185, passed by the 65th General
Assembly.

Section 12097(A), Laws of Missouri, 1943, page 542, which
section is applicable to cities having a population of not less
than 300,000 nor more than 700,000 inhabitants, provides as
follows:

"The Board of Election Commissioners, in
addition to all other powers conferred upon
it by this Article, shall have the power
and authority, in its discretion, in any
special constitutional election for the
election of delegates to a constitutional

Board of Election Commissioners

convention, or any election called for the purpose of submitting the issue of adoption of a Constitutional Amendment or Amendments, to consolidate two or more precincts, and to use one set of judges and clerks in such consolidated voting area and to dispense with a clerks' canvass and the printing of registration lists for such special election, and the Board of Election Commissioners shall have the power and authority to substitute the last printed registration list, corrected to the final date of registration and transfer for such special election, for the registers at any polling place, providing that following any such election in which such registration lists are so substituted, the Board of Election Commissioners shall cause the voting record of all persons voting in such election to be entered upon the registration affidavits of all such persons."

In a previous opinion to you, rendered under date of January 18, 1950, we held that such section constituted the general law relating to submission of constitutional amendments for a special election and that such section was applicable to the special referendum election to be held April 4, 1950. Such opinion had reference to the question of whether or not a clerk's canvass was necessary preceding such election. This conclusion was arrived at on the authority of the case of *State ex rel. v. Westhues*, 9 S.W. (2d), at 612, a portion of which opinion we quoted in our opinion to you of January 18, 1950. Under the holding in the *Westhues* case we believe that all the provisions contained in Section 12097(1), *supra*, are applicable to the special referendum election to be held April 4, 1950.

Section 12101, Laws of Missouri, 1943, page 556, provides as follows:

"Said board of election commissioners shall not later than six months after the selection and qualification of each succeeding board of election commissioners thereafter, select and choose four registered voters as judges of election for each precinct in such city. They must be registered voters in the city at the next election, and they must be men or women of good repute and character who can speak, read and write the

Board of Election Commissioners

English language and be skilled in the four fundamental rules of arithmetic, and they must be of good understanding and capable. They must either reside or be employed or have a place of business in the ward for which they are selected to act; and they must not hold any office or employment under the United States, the State of Missouri, or under the county or city in which such election is to be held, and they must not be candidates for any office at the next ensuing election. Two clerks of election for each precinct shall be selected within the same time by said board, and shall possess the same qualifications as the judges. Being a notary public shall be no disqualification for judge or clerk. No person shall be appointed nor serve as judge or clerk in any election or registration who has been convicted of an offense punishable by imprisonment in the penitentiary, or who has been confined in any county jail, workhouse, penitentiary or house of correction under sentence within five years prior to such appointment. Said judges and clerks shall be appointed for a term ending sixty days after the next presidential election after the election at which they were appointed to serve, and shall, during said term, and until their successors shall be selected and qualified, serve as judges and clerks at all special, local, municipal, primary and general elections, and the terms of all judges and clerks now regularly appointed, serving and acting shall be extended for a term ending sixty days after the presidential election in the year 1944, or until their successors shall be selected and qualified. The board shall have power at any time in the event of the death, disqualification, resignation, removal for cause, inability, refusal or incapacity of any regularly commissioned judge or clerk to act, to fill any such vacancy by the temporary appointment or by the appointment for the unexpired term of a person possessing the same qualifications required for regular appointment without publication."

Board of Election Commissioners

We believe that the reference in Section 12101, supra, providing that the judges and clerks shall serve at all special, local, municipal, primary and general elections, means that only those persons appointed by the Board as judges and clerks shall serve at any election and that no special judges or clerks are to be appointed for any particular election.

We do not believe there is any conflict between Sections 12101 and 12097(A) insofar as Section 12097(A) provides for the consolidation of precincts at special elections where issues are to be voted on. We therefore believe that Section 12097(A) constitutes the general law with regard to special elections at which a question is to be voted on and that such section applies to the special referendum election to be held April 4, 1950.

CONCLUSION

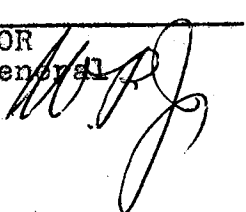
It is the opinion of this department that the Board of Election Commissioners of Kansas City may consolidate two or more precincts and use one set of judges and clerks in such consolidated voting area, and dispense with the clerk's canvass and the printing of registration lists for the special referendum election to be held April 4, 1950.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



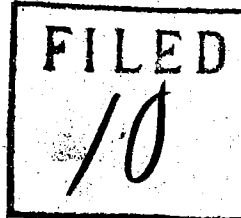
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ELECTIONS:
BOARD OF ELECTION
COMMISSIONERS,
KANSAS CITY,
MISSOURI:
REFERENDUM ELECTION:

Kansas City Election Board has right and
duty to conduct special referendum election
in that part of Clay County purportedly
annexed to Kansas City.

February 20, 1950

2/20/50



Board of Election Commissioners
Kansas City, Missouri

Attention Mr. Elmo B. Hunter and Mr. W. Raymond Hedrick,
Attorneys.

Gentlemen:

This is in answer to questions two and three of your
letter of recent date requesting an official opinion of
this department, reading as follows:

"2. There is a further question as to
whether the Kansas City, Missouri Election
Board should set up polling places in
the new annexed territory in Clay County,
which became a part of the city on Jan-
uary 1 of this year. As you know, the
Supreme Court has not made a final de-
cision upon this matter, and probably
won't until after the April 4 election.

"3. The Board wishes advice as to
whether there is any legal duty upon it
to treat the purported annexation as
being valid and to provide the residents
in the purported annexed territory with
an opportunity to register and to vote
in the City of Kansas City, Missouri."

In the case of State of Missouri ex inf J. E. Taylor,
Attorney General, ex rel Kansas City, Missouri v. City of
North Kansas City, No. 40216, now pending in the Supreme
Court of Missouri, the following motion for order to restrain
relator from exercising municipal control over territory
sought to be annexed was filed by intervenors November 8,
1949:

"Now come the Intervenors by their attorneys
and move the Court to make an order restrain-
ing the Relator from taking charge of the
land in Clay County, Missouri sought by it

to be annexed and from exercising municipal control and authority over the same until the final decision of this Court, upon the validity of said annexation for the following reasons:

"1. It appearing that the ordinance alleged to have been passed by the Relator provides that Relator will take charge of the territory sought to be annexed on January 1, 1950 and because Relator has joined in this proceeding and has acknowledged that there is a question as to the validity of said ordinance and has agreed that its validity may be determined by this Court, any taking charge of said territory or any exercise by it of municipal authority of said territory would be premature.

"2. That the taking over of said territory and the enforcement of its municipal ordinances and the rendition of any municipal service within said territory and the assessment of any taxes thereon would immediately result in confusion and conflict of authority and hardship to the inhabitants of said territory and would be without statutory authority therefor.

"3. That the Relator, Respondent and Intervenor having joined issue on the matters set forth in their respective pleadings are all subject to the orders of this Court and that each of them should be restrained from exercising any authority or from performing any duties that are inconsistent with the position which each occupied prior to the commencement of this litigation.

"4. That it appears from the pleadings that Respondent has been restrained by an order of this Court from taking charge of the territory it sought to annex and from exercising any municipal authority and control over said territory.

"WHEREFORE, the Intervenor prays the Court to order that Relator be restrained from taking charge of the territory it seeks to annex and from exercising any municipal

authority over the same and to prevent the rendition of any municipal service or to create any lien or exact any license fees or taxes from the territory described in the pleadings pending the final determination of this cause."

Suggestions in opposition to this motion were filed by relator and read in part as follows:

"The motion of Interveners should be denied. The Relator, in compliance with what it conceives to be its public duty, for some time has been and is now making extensive and detailed preparations to render municipal services in the annexation area, beginning January 1, 1950. Said services would include fire protection, police protection, street repairing, traffic regulations, hospital and health service, sanitary services, garbage collection, and all other municipal services not involving capital improvements, and unless restrained by this Court it will proceed to render such services beginning January 1, 1950."

The motion to restrain relator from exercising municipal control over territory sought to be annexed was overruled by the Supreme Court December 12, 1949. We believe that the effect of the overruling of such motion by the Supreme Court of this state constitutes a holding by such court that until such time as the court rules on the case now pending before it, Kansas City has the right and privilege of exercising control over that part of Clay County purportedly annexed to Kansas City.

We believe, therefore, that laws applicable to Kansas City are applicable to that part of Clay County purportedly annexed to Kansas City as of January 1, 1950, until such time as the court rules against such city's contention. The election laws found in Article III, Chapter 76, Revised Statutes of Missouri Annotated, therefore, we believe, are applicable to that part of Clay County purportedly annexed to Kansas City, and authorize the Kansas City Election Board to take charge of and hold the elections in that part of Clay County purportedly annexed to Kansas City.

The Quo Warranto suit now pending in the Supreme Court will decide whether or not the purported annexation by Kansas

City of a certain portion of Clay County was valid and the decision of the Supreme Court will relate back to January 1, 1950, the date upon which the annexation took effect, if such annexation was valid.

Section 12099(A), Laws of Missouri, 1945, p. 875, provides as follows:

"In all cities which have or may hereafter have a population of not less than 300,000 inhabitants nor more than 700,000 inhabitants, the board of election commissioners of such city may, within seventeen months after each presidential election, and shall in the case of the extension of territorial limits by annexation, within sixty days after the effective date of any such annexation, revise, rearrange, redistrict and divide said city into not less than sixteen nor more than twenty districts to be known as wards. These districts or wards shall be so located that the number of registered voters in none of said districts or wards shall, as shown by the registration of voters for the presidential election next preceding said redistricting or division, exceed that of any other district or ward by more than twenty-five per cent, and they shall be of contiguous and compact territory, consecutively numbered, and be substantially in the same position as formerly in such city or cities in so far as the same may be practicable. These districts or wards shall be so arranged, divided or districted that no voting precinct shall be located in more than one district or ward. The terms of all persons holding public office to which they have been elected from existing wards at the time that such redistricting becomes effective, shall not be vacated or otherwise affected thereby."

Since the positive duty is placed upon the Board of Election Commissioners of Kansas City to revise, rearrange, redistrict and divide such city within sixty days after the extension of its territorial limits by annexation, we believe it would be the duty of the Election Board of Kansas City to conduct the election within the territorial limits of the

Board of Election Commissioners

February 20, 1950

entire city, including that part of Clay County purportedly annexed to Kansas City, since such annexation, if valid, took place January 1, 1950.

We do not in any way rule upon the validity of the purported annexation by Kansas City of a portion of Clay County, but hold only that until such time as the Supreme Court rules in the case before it relative to such purported annexation, that the Election Board of Kansas City has the right and duty of conducting elections in such purportedly annexed territory.

CONCLUSION

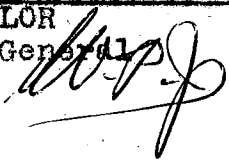
It is the opinion of this department that it is the right and duty of the Election Board of Kansas City, Missouri, to hold and conduct the special referendum election of April 4, 1950, in that part of Clay County purportedly annexed to Kansas City January 1, 1950.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



CBB:lrt

OPTOMETRY:

An optometrist is forbidden by law to advertise directly or indirectly prices or terms for optometric services.

Filed No. 10

June 8, 1950



Mr. J. R. Bockhorst, O.D., Secretary
Missouri State Board of Optometry
136 North Second Street
St. Charles, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon three purported violations of the Missouri Optometry Law, the details of which are set forth by you.

One of these cases is that a Doctor A, whose advertisement appears in an issue of a newspaper. That portion of his advertisement in question reads: "Convenient Credit Terms. Free Parking."

Another is that of the firm of X and Y. This firm mailed to a prospective customer an advertisement which included a credit card to be signed by the recipient. This credit card states that the signer "is a member of our credit honor roll and privileged to all credit courtesies - 10% discount member for 1949." This advertisement further states: "Your charge account is already open - easy terms, no interest, no carrying charges, take a year to pay! Just say 'charge it.' We now have a complete optical department - Doctor B in charge."

Another is that of Doctor C, whose advertisement appears in a circular which contains the advertisement of numerous other items. His advertisement reads in part: "Complete optical service. Just add it to your account. Omnibus makes it easy to buy, easy to pay, easy terms. * * *"

Section 10121 Laws Missouri, 1947, Volume I, page 414, states:

"The State Board of Optometry may either refuse to issue, or may refuse to renew,

Mr. J. R. Bockhorst

or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes.

* * * * *

"(g) Advertising, directly or indirectly, prices or terms for optometric services."

Let us first consider the case of Doctor A, whose advertisement reads: "Convenient credit terms. Free Parking." In an opinion rendered by this office on January 6, 1948, to Dr. George A. Winterer, we stated:

"When used in connection with prices or conditions of payment, the courts have held that the word 'terms' means the time and manner of payment. Nakdemen v. Ft. Smith and Van Buren Bridge Dist., 115 Ark. 194, 172 S.W. 272. Carson v. Smith, 5 Minn. 78. Such definition would seem to carry out the intention of the legislature in adopting the section in question; the purported intention being to prevent reference in advertising to either the price or the manner of payment for optometric services."

The conclusion of the above opinion was that "the advertisement of optometric services on credit is the advertisement of 'prices or terms for optometric services' under Section 10121(g) Mo. R.S.A., 1939, as amended."

This opinion we deem to be consonant with an opinion rendered to Dr. J. R. Bockhorst by this office on June 29, 1948, holding that an advertisement reading "prices are reasonable" is not in violation of Section 10121(g).

In the case of City of Clovis v. Southwestern Public Service Co., 161 Pac. (2d) 878, the court stated that the word "terms" has reference to the "time and amount of money paid."

The same definition of the word "terms" was made by the court in the case of Federal Land Bank of New Orleans v. Miller, 25 Southern (2d) 11.

The advertisement of Doctor A quoted above, uses the words "convenient credit terms." In view of the definitions of the word

Mr. J. R. Bockhorst

"terms" both in the quoted opinion and out of it, and in view of the opinion itself, it is our belief that in so advertising Doctor A is in violation of Section 10121(g) which prohibits advertising, directly or indirectly, price or terms for optometric services.

We will now consider the case of the firm of X and Y, whose manner of advertising is set forth above. From the advertisement, it is apparent that these two men operate a jewelry store of which the optical department is but a part. If the advertisement of Doctor A set forth and discussed by us above, is in violation of Section 10121(g), which we have held it to be, then so also is that of the firm of X and Y, whose advertisement goes much further in its extension of credit terms than does the advertisement of Doctor A.

The advertisement of Doctor C, set forth above, appears in a circular among the advertisements of many other things such as lamps, dishes, dresses, suits, furniture, et cetera. The circular is issued by a store known as Omnibus.

In this case, as in that of X and Y, the optical is but one of several departments. Also in this case, as in that of X and Y, the advertising is in violation of Section 10121(g), if the advertisement of Doctor A is in violation of it, which we have held it to be, because obviously it goes considerably further than does the advertising of Doctor A in extending credit terms.

There is no showing in the case of Doctor B, who has charge of the optical department in the X and Y store, and of Doctor C, who is in charge of a similar department in Omnibus store, what the arrangements are between the doctors and the stores. We do not know whether these doctors are purely salaried employees, or whether they simply have space in the stores for which they pay a fixed monthly rental. It is clear from the advertisements in both cases that the credit terms for optical supplies and for the services of the optometrist is handled by the store and not by the optometrist, and that the advertising is likewise done by the store. We cannot conceive, however, that any arrangement of the optometrist with the store would exempt them from operating under the State Optometry Law and specifically from Section 10121(g). Exemptions from the operation of this law are set forth in Laws Missouri 1947, Volume I, page 414. This law states:

"The following persons, firms and corporations are exempt from the operation of the provisions of this Chapter except the provisions of Section 10124:

Mr. J. R. Bockhorst

"(a) Physicians or surgeons of any school lawfully entitled to practice in this state.

"(b) Persons, firms and corporations, not engaged in the practice of optometry, who sell eye glasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery.

"(c) Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry, and who do not use a trial case, trial frame, test card other than that used by the customer or customers alone, vending machine or other mechanical means to assist the customer in selecting glasses."

Nothing in the above could be construed to exempt from the application of Section 10121(g) Doctors B and C.

If it be suggested that they are not liable to the application of Section 10121(g), because they do not themselves do or pay for the objectionable advertising (although on the bare facts before us, we do not know that they do not, directly or indirectly, pay for the advertising), it may be said in reply that it is a well known maxim of the law, that one cannot evade the consequences of the law by allowing another to do for him that which he cannot lawfully do himself. If this were not so then by a duplicitous technical arrangement an optometrist could become the employee of another and Section 10121(g) could be flaunted with impunity to the detriment of those optometrists who chose to practice within the law. Certainly it was not the intention of the law that this be done.

Clearly there is nothing in the advertisements of the X and Y or of Omnibus store to indicate that they are advertising optical supplies only. On the contrary, it is clear that they are advertising both optical supplies and optometric services.

Our attention has been directed to the case of State v. Gate City Optical Company, 339 Mo. 427, as perhaps bearing on the situation of Doctors B and C. In this case a department store and

Mr. J. R. Bockhorst

an optical supply company entered into an agreement whereby the optical supply company furnished optical supplies and employed an optometrist to be in charge of an optical department in the store. All receipts by the optical department were paid to the cashier of the store; all advertisements of the optical department were by the store; and the optometrist in charge of the department was paid a weekly salary plus a percentage of the receipts. The question before the court was whether the optical supply company and the store were practicing optometry, and the court held that they were not. It seems obvious to us that on the facts set forth above, this case is not applicable to the instant case, in which the issue is whether Doctors B and C were guilty of violating Section 10121(g) of the Optometry Law.

CONCLUSION

We are of the opinion that, on the basis of the material submitted to us, that the State Board of Optometry would be justified in citing the licensees involved to appear before the Board for a hearing to determine whether or not action should be taken by the Board to suspend or revoke the licenses of the persons involved.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS: School board may contract for services
ATTORNEY AND CLIENT: of attorney, with attorney fee to be
paid on percentage basis.

July 26, 1950



Honorable Ted A. Bollinger
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this office,
which reads:

"An opinion is requested of your office of
the following state of facts:

"An audit of the books and records of the
treasurer's office of Shelby County re-
flected a shortage of some \$4470.00 in
the school funds. This shortage is pro-
portionate over all school districts, the
approximate figure to the Clarence Special
School District being \$2300.00. A civil
action has been instituted against the
surety on the treasurer's bond for this
shortage. The Clarence School District
has employed a special counsel to assist
the plaintiff in the prosecution of the
civil case, promising him a percentage
fee out of the amount due the school
district. The issue therefore is whether
or not such school district can legally
employ counsel and pay him in the manner
so stated out of the school funds due said
district."

We are enclosing a copy of an opinion rendered by this
office under date of November 14, 1946, to Mr. Marshall Craig,
a prosecuting attorney in the state, which we believe is author-
ity for holding that the courts have recognized the power of
school boards to employ attorneys when situations arise which
necessitate the board having the services of an attorney and
paying for said services out of public school funds.

Since a school board can contract for the services of an attorney, the principal requirement to make such employment legal is that the contract of employment must comply with the provisions of Section 3349, R.S. Mo. 1939, which is set out in the copy of the opinion which we are enclosing.

It is a common practice among attorneys of this state, if not of every state, to contract for their fee with clients on a percentage basis. Such contracts between attorney and client are not illegal or against public policy. As a matter of fact, such contracts are authorized by law in this state, for Section 13338, R.S. Mo. 1939, in part, provides:

"In all suits in equity and in all actions or proposed actions at law, whether arising ex contractu or ex delicto, it shall be lawful for an attorney at law either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action, or at any stage after the institution of suit or action, * * *"

Prior to the repeal of Sections 10663 to 10667, R.S. Mo. 1939, the Legislature had authorized the contracting for services of an attorney to collect school money and the payment of the attorney fee on a percentage basis. Under Sections 10665 and 10666 the State Board of Education was empowered to employ an attorney in each Congressional District to prosecute suits to recover state school moneys diverted to an unlawful use. The attorney so employed, who prosecuted all such claims to final judgment in favor of the state or county, was to be compensated by receiving a per cent of the sum collected.

Reference is made to the above sections, although now repealed, for the purpose of showing that the Legislature has heretofore recognized that paying an attorney on a percentage or contingent basis out of school moneys to be collected was proper.

In the absence of any legislative enactment specifically permitting a school board to contract for the services of an attorney and pay him on a percentage basis from money to be collected, we see nothing reprehensible in this type of contract inasmuch as generally between attorney and client such a contract is proper.

Honorable Ted A. Bollinger

-3-

CONCLUSION

It is therefore the opinion of this department that a written contract entered into between a school board and an attorney for services to be rendered in the future by the attorney on behalf of the school board would be a valid contract, even though the provision thereof relating to payment of the attorney fee would be on a percentage basis rather than on a fixed fee basis.

Respectfully submitted,

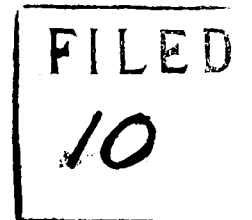
RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DIVORCE; Consent of mother having custody of minor under divorce
RECORDER: proceeding necessary for issuance of marriage license.
MARRIAGE: Father's consent insufficient.

August 30, 1950



Honorable Ted A. Bollinger
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Sir:

This is in reply to your request for an opinion, which request is as follows:

"An opinion is requested of your office on the following question:

"Whether a recorder of deeds can properly refuse to issue a marriage license to a minor male when such minor exhibits a written consent executed by his father in proper form when the recorder is familiar with the fact that the father is divorced from the mother wherein custody of the minor was awarded to the mother. The mother of the minor had written to the recorder stating her objection to the marriage of the minor and on that ground the recorder refused to issue a license notwithstanding the written consent of the father?"

Section 3370, R.S.Mo. 1939, is as follows:

"No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age: Provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable, and no recorder shall issue a license

Honorable Ted A. Bollinger

authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are of age, or whether the male is under the age of twenty-one years, or the female under the age of eighteen years, and if the male is under the age of twenty-one years or the female is under the age of eighteen years, the name of the father, mother or guardian consenting to such marriage."

Section 3371, R.S.Mo. 1939, provides:

"Any person who shall solemnize any marriage wherein the parties have not obtained a license, as provided by this chapter, or shall fail to keep a record of the solemnization of any marriage, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars, and in addition shall be subject to a civil action by the parent, guardian or other person having care or custody of the person so married, to whom services are due wherein the recovery shall not exceed the sum of five hundred dollars; and any recorder who shall issue a license contrary to the provisions of this chapter shall be subject to a like punishment."

In an opinion under date of August 11, 1945 (Anderson), this office set out the above statutes and in comment thereon stated as follows:

"In view of the penalty attached to the issuance of a license contrary to these provisions, we believe that the recorder has the right to demand reasonable proof

Honorable Ted A. Bollinger

of the guardianship asserted by a person purporting to give his consent to the issuance of the license to a minor. Parenthetically, we might say that the same rule would apply to any person who claimed to be the parent of a minor seeking a license. Of course, if the recorder is satisfied that the person claiming to be the parent or guardian of the minor is actually such parent or guardian, he might well waive written proof of such parentage or guardianship, but, in the absence of such actual knowledge, we believe that it would be reasonable to require written proof of such parentage or guardianship."

In the case now before us, we have a situation where the status in regard to the custody of the child has been made known to the recorder. Under these circumstances, we believe that this question has been answered by an opinion of the Supreme Court in the case of Vaughn v. McQueen, 9 Mo. page 196, wherein the Court declared the law of consent to be as follows, l.c. 197:

"The only question to be determined is the sufficiency of this plea. In other words, can the mother of a minor consent to the marriage of such minor when there is a guardian? The 7th section of the act regulating Marriages prohibits the joining in marriage of minors, 'unless the parent or guardian or other person under whose care and government such minor may be, shall be present and give consent thereto, or unless the minor applying shall produce a certificate in writing under the hand of the parent or parents or guardian, or if such minor has no parent or guardian, then under the hand of the person under whose care and government he or she may be.' The 8th section affixes a penalty for transgressing this law.

"Our act concerning Guardians provides in certain cases for the appointment of guardians, whilst the father and mother are both living. There may also be a testamentary guardian, during the life of the mother. It may therefore happen that the father, the mother and a guardian are all in existence

Honorable Ted A. Bollinger

at the same time, in which event the question arises, as it did in this case, whether the consent of either is sufficient to authorize the marriage ceremony, or whether the law contemplates only one person as authorized to give the consent, either by his presence or certificate of approbation?

"The only construction which we think justified either by the grammatical construction of the sentence, or by the general scope of the statute, with reference to its object and the mischief designed to be remedied, is the one which limits the power of consent to one individual, and authorizes the consent of another only in the alternative. The last clause of the seventh section provides that the certificate shall be 'under the hand of the parent or parents or guardian, or if such minor has no such parent or guardian, then under the hand of the person under whose care and government he or she may be.' This phraseology it must be admitted is loose, inartificial and inaccurate, but the sense is sufficiently apparent. In the eighth section, the meaning of the lawgiver is more clearly expressed. It requires the officiating clergyman or justice, before proceeding to marry a minor to have 'the certificate or presence and consent of the parent or guardian, or other person having the care and government of such minor.' By this we understand that the consent of the person who has the legal custody of the minor, whether he be the guardian, or the father, or the mother, or the master, must be obtained. and there can be but one person authorized to give such consent. A strange absurdity would result from any other interpretation. The courts may, by the authority vested in them by our laws, deprive a dissolute, worthless or insane parent of that authority with which the laws of nature have invested him, and place the person and property of the infant under the control of a guardian, and yet the father be allowed under the construction contended for by the defendant and sanctioned by the Circuit Court, to thwart the

Honorable Ted A. Bollinger

legitimate control conferred upon the guardian, and that too in one of the most important steps which can be taken by the minor, and one likely to have a most serious influence upon his future happiness and prosperity."

As to the legal effect of the granting of custody of a minor child in a divorce proceeding, we refer you to the following statement in Lee v. People, 127 P. 1023, wherein the court said at l.c. 1024:

"The defendant appeared and contested the action in which the decree awarding the custody of the child to the mother was rendered. He was fully advised that his only right under the decree was to visit the child once a month for a stated time and within a limited distance from the mother's abode. By the express terms of the decree, the exclusive control and custody of the child were vested in the mother. The natural right of the father to have the custody and control of his child was taken away by law. It is well settled that, unless modified or set aside, a decree awarding the custody of a child is conclusive, and that such an award in favor of the mother against the father operates to divest the latter of all right over the child. 14 Cyc. 810."

Since the custody of the minor has been awarded to the mother and therefore the legal control of the father has been divested, we believe that it is necessary to obtain the consent of the mother who has legal custody of the minor.

CONCLUSION

Therefore, it is the opinion of this department that where the custody of a minor has been awarded to a mother in a divorce proceeding, the consent of the mother is necessary

Honorable Ted A. Bollinger

for the issuance of a marriage license to the said minor and the consent of the father is not sufficient, and if the recorder has knowledge of such facts regarding custody, he may properly refuse to issue a marriage license.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

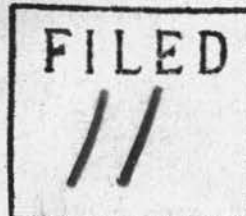
J. E. TAYLOR
Attorney General

MOTOR VEHICLES:
CRIMINAL LAW:

Failure to deliver certificate of title
upon sale of motor vehicle misdemeanor
punishable by fine and jail sentence.

March 9, 1950

3/13/50



Honorable Edwin F. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Sir:

This office is in receipt of your recent request for an
official opinion. You thus state your request:

"The subject named section, (Section 8382, R.S.
Mo. 1939) pertaining to transfer and sale of
registered vehicles (as amended Laws 1947, page
380) provides among other things that 'It shall
be unlawful for any person to buy or sell in
this state any motor vehicle or trailer registered
under the laws of this state, unless at the time
of the delivery thereof, there shall pass between
the parties such certificate of ownership with an
assignment thereof, as herein provided, . . .'
The section further provides that such sales with-
out assignment of the certificate shall be fraud-
ulent and void.

"Does the violation of the provisions of this
section by a dealer in selling and delivering an
automobile, collecting the price and then failing,
neglecting and refusing to deliver a properly
assigned certificate of title to the car constitute
a misdemeanor? If so, what is the penalty? Inas-
much as such sales are declared by this section to
be fraudulent, would the appropriate action be under
the criminal statutes on fraud, such as section 4487,
obtaining money, goods, by false pretenses?"

Section 8382, R. S. Mo. 1939, Article 1, of the Motor Vehicle
Act, states in part:

Honorable Edwin F. Brady

"* * *It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless, at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void. * * *

This section was repealed by the Laws of Missouri 1947, Vol. 1, page 380, and a new section was enacted which was substantially similar to the section repealed, and which reenacted in precisely the same language that part of Section 8382 quoted above.

Section 8404(d) Mo. R. S. A. 1939, Article 1, of the Motor Vehicle Act, states:

"Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

This penalty section would apply to the 1947 law referred to above, enacted in lieu of Section 8382 which was repealed.

In the case of Personal Finance Co. of Missouri v. Lewis Inv. Co., 138 S. W. (2d) 655, the court stated:

"Section 7786(d), (now Sec. 8404) Mo. St. Ann. Secs. 77-86(d), p. 5240, provides that any person who violates this provision of the statute shall, upon conviction thereof, be punished by a fine of not less than five or more than five hundred dollars, or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment. So that it thus appears that the sale of a motor vehicle without passing the certificate of ownership with the assignment endorsed thereon at the time of the delivery of the motor vehicle is not only unlawful, fraudulent, and void, but is a criminal act. It passes no title whatever to the motor vehicle, not even an insurable interest. State

Honorable Edwin F. Brady

ex rel Connecticut Fire Ins. Co. v. Cox,
306 Mo. 537, 268 S.W. 87, 37 A.L.R. 1456;
Universal Credit Co. v. Story, Mo. App.,
128 S.W. (2d) 654; Mathes v. Westchester
Fire Ins. Co., Mo. App., 6 S.W. (2d) 66;
Quinn v. Gehlert, Mo. App., 291, S.W. 138."

In the case of Pearl v. Interstate Securities Co., 206 S.W.
(2d) 975, the court stated:

"Plaintiff did obtain the title certificates with assignments thereon signed by each owner at the time the cars described therein were delivered to him as Section 8382 required. However, plaintiff did not fully comply with the statute because he did not have the assignment of the certificates to him by the holders completed in the form prescribed by the Commissioner which included an acknowledgment before a notary. He had only an unacknowledged assignment, and this was not sufficient to vest the legal title in him. Although he was a notary he had no authority to take an acknowledgment on an assignment to himself as he said he intended to do. 1 Am. Jur. 334-335, Secs. 52-53; 1 C.J.S. Acknowledgments. Secs. 52-53. Nor would he or anyone else have had the right to fill in the name of Security as assignee from the holders because he was the buyer and Section 8382 required the assignment to be made to him. To do so would be a misdemeanor. Sec. 8404 (d) R.S. 1939, Mo. R.S.A. * * * #

(Underscoring ours)

CONCLUSION

It is the conclusion of this department that the violation of Section 8382 (d), Laws of Missouri 1947, page 389, constitute a misdemeanor; that the penalty for this violation is that any person who is convicted of violating it shall be punished by a fine of not

Honorable Edwin F. Brady

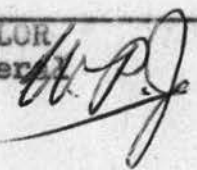
less than five dollars or more than five hundred dollars or by imprisonment in the county jail for a term not exceeding two years or by both such fine and imprisonment.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



HPW:hr

CRIMINAL LAW:
GAMBLING:

Pinball machine which pays off in free games
only is not a gambling device.

April 14, 1950

4/17/50



Honorable Edwin F. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Sir:

This is in answer to your letter of recent date
requesting an official opinion of this department, reading
as follows:

"It is requested that you give me your
opinion in answer to the following
question:

"Is a pinball machine in which the player
must insert a coin to play and which pays
off in free games in the event certain
scores are attained a gambling device
under the laws of this state?

"In connection with this problem I have
already read your opinion of September 15,
1949, to Mr. Ronald J. Fuller, Prose-
cuting Attorney of Phelps County, and the
case of State v. Jack and Jill Pinball
Machine, 224 S.W. 2d 854.

"In your opinion to Mr. Fuller you did
not rule directly on the free game
question. After reading the Jack and
Jill case I am anxious to have your
opinion on this matter."

The opinion to Mr. Ronald J. Fuller, Prosecuting Attorney
of Phelps County, under date of September 15, 1949, held as
follows:

"In the premises, it is the opinion of
the department that a one-ball pinball
machine, commonly known as the Horse Race

April 14, 1950

Game, is a device or game, the operation of which with successful or winning results is dependent upon chance. If in playing the game the player has the chance to receive something of more value than the amount invested to play it, the game is one characterized as a gambling device used for gaming under Section 4678, R. S. Mo. 1939."

In the case of State v. One "Jack and Jill" Pinball Machine, 224 S.W. 2d 854, the Springfield Court of Appeals held that a pinball machine which paid off only in free games was not a gambling device in a proceeding to have a pinball machine condemned and destroyed. The court said, l.c. 855:

"The sole question before us is: In the operation of this machine, does the fact that the player may play a free game or games upon the attainment of a certain score make it a gambling device under our statutes and subject it to confiscation?"

The court said with regard to Section 4678, upon which the opinion to Mr. Ronald J. Fuller was based, l.c. 856:

"Section 4678 of the Revised Statutes of Missouri 1939, Mo. R.S.A., provides: 'Every person who shall permit any gambling table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or of which he hath at the time the possession or control, shall, on conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail or workhouse for not more than one year nor less than thirty days, or by fine not exceeding five hundred dollars or less than fifty dollars.'

"This statute does not define a gambling device but makes it a crime to permit one to be set up or used in a house, etc."

The court further said, l.c. 860:

Honorable Edwin F. Brady

April 14, 1950

"Gambling, as judicially defined, has three necessary elements, (1) consideration or risk, (2) chance and (3) reward or prize. But the legislature has required the third element, when referable to a gambling device, to be 'money or property.' Does the player get property for his nickel? We think not. It is argued that he gets amusement. The vacuous mind that may momentarily be brightened by finding entertainment and amusement in watching a metal ball meander aimlessly over the surface of an inclined table and finally score by dropping from sight into an aperture therein, would be equally entertained by watching a certain species of scarabaeoid beetle aimlessly roll his putrid ball across the ground and into a hole where eventually it becomes sustenance for itself and young. Would not the entertainment and amusement in each instance be the same though five cents is paid to pull the plunger in the one and in the latter, the propulsion is by the beetle and its accomplishments are not emblazoned upon an electrically lighted scoreboard. The privilege of watching either would certainly not be property, under Section 4675, and we shall not dignify either by holding it to be 'a thing' of value."

Therefore, it is our view that a pinball machine which pays off only in free games is not a gambling device in this state.

Conclusion

It is the opinion of this department that a pinball machine which pays off only in free games is not a gambling device in this state.

Respectfully submitted,

Approved:

C. B. BURNS, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General
CBB:lrt

SCHOOL BUSES: Any motor vehicle operated for the purpose of transporting school children shall be required to comply with Laws of Missouri, 1949, p. 329, requiring the vehicle be marked with the specified lettering and equipped with a signaling device.

September 27, 1950.

Filed: #11

Honorable Edwin F. Brady,
Prosecuting Attorney
Benton County,
Warsaw, Missouri.



Dear Sir:

This will acknowledge receipt of your recent letter requesting an opinion from this office. Your request reads as follows:

"Re: Section 10327.1, R.S.Mo.,
School Buses.

"Does the above mentioned section apply to private passenger automobiles and commercial vehicles which are used as school buses, or does it only apply to vehicles of the school bus type?

"For instance, would a person using a sedan or station wagon as a school bus be required to have the school bus signs and signalling devices?

"It is my interpretation that this section should apply to all motor vehicles used as school buses, but I believe there is some question whether it is being interpreted to apply to all such vehicles or only vehicles of the bus type."

Section 10327.1, Mo. R.S.A. (Laws of Missouri, 1949, p. 329), to which you refer in your letter, reads as follows:

"A. The driver of a vehicle upon a highway outside the limits of an incorporated town or city, upon meeting or overtaking from either direction any school bus which has stopped on the highway for the purpose of receiving or discharging any school children and whose driver has in the manner prescribed by law given the signal to stop, shall stop the vehicle before reaching such school bus and shall not proceed until such school bus resumes motion, or until signalled by its driver to proceed.

Honorable Edwin F. Brady,

"B. Every bus used for the transportation of school children shall bear upon the front and rear thereon a plainly visible sign containing the words 'school bus' in letters not less than 8 inches in height. Each bus shall have lettered on the rear in plain and distinct type the following: 'State Law: Stop while bus is loading and unloading.' Each school bus subject to the provisions of this act shall be equipped with a mechanical or electrical signalling device, which will display a signal plainly visible from the front and rear and indicating intention to stop.

"C. The driver of a vehicle upon a highway with separate roadways need not stop upon meeting or overtaking a school bus which is on a different roadway or which is stopped in a loading zone constituting a part of, or adjacent to, a limited or controlled access highway at a point where pedestrians are not permitted to cross the roadway."

This office recognizes the fact that there are numerous school districts in which school children are transported by buses to schools; that it frequently happens that a sedan, station wagon or other vehicle with a small carrying capacity is adequate and sufficient to transport the children, rather than using a larger vehicle or bus having twenty-five or more carrying capacity. The use of a smaller vehicle has long been recognized by the State Department of Education and the courts as the practical, economical and most suitable form of transportation in many instances where a larger vehicle would serve no additional purpose. In 1947 the Court in the case of *State ex rel. Rice v. Tompkins et al.* (203 S.W. (2d) 881, 1.c. 883) remarked:

"When transportation in a school district has been voted it is the duty of the Board of Directors or Board of Education to provide for such transportation, providing money is available in the incidental fund of the district to meet the expense thereof, and if the Board, without reasonable cause therefor, fails to provide transportation, it may be compelled to do so by mandamus. However, this does not mean that the court may by the hard and unyielding writ of mandamus substitute its discretion for that of the Board as to the means and manner and sufficiency and safety of the transportation to be furnished. * * "

Honorable Edwin F. Brady,

Many different types of vehicles are used for transporting school children; some of the vehicles may carry twenty-five to fifty pupils, but in numerous districts where the number of children to be transported is small "jeeps", "carry-alls", "station wagons" and coaches and sedans of the commonly accepted passenger car design are frequently used. Recognizing that there is no necessity to use, for example, a twenty-five passenger vehicle to transport four to eight children there is employed some type of small vehicle in those instances where the larger bus would be impractical.

Your question then is whether Laws of Missouri, 1949, p. 329, quoted above, should be construed to apply to the smaller vehicles used for transporting school children.

It is a cardinal rule in construing a statute, repeated many times by the Supreme Court of this state, that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein. This principal was reiterated in Arto-phone Corporation v. Coale, 133 S.W. (2d) 343, 345 Mo. 354, in these words, "The primary rule of construction of statutes is to ascertain the lawmakers' intent from the words used, if possible, and to put on the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and manifest purpose of the statute."

It is clearly the purpose of this section to provide safety measures for school children transported by motor vehicle to and from schools. This section requires the driver of a vehicle upon a highway outside the limits of an incorporated town or city, upon meeting or overtaking from either direction any school bus which has stopped on the highway for the purpose of receiving or discharging any school children and whose driver has in the manner prescribed by law given the signal to stop, shall stop the vehicle before reaching such school bus and shall not proceed until such school bus resumes motion, or until signalled by its driver to proceed.

The danger to school children entering or leaving a small capacity motor carrier from passing or on-coming motorist is as great as though they were leaving a larger bus, and their need for this safety measure is as great whether a small or large motor vehicle be used for such transportation.

In order that all motorists who might be approaching a vehicle used for carrying school children should be informed of the use of such vehicle and have fair warning that the vehicle would be stopping at intervals, the legislature has provided that "every bus used for the transportation of school children shall bear

Honorable Edwin F. Brady,

upon the front and rear thereon a plainly visible sign containing the words "school bus" in letters not less than 8 inches in height. Each bus shall have lettered on the rear in plain and distinct type the following: "State Law: Stop while bus is loading and unloading": "Each school bus subject to the provisions of this act shall be equipped with a mechanical or electrical signalling device, which will display a signal plainly visible from the front and rear and indicating intention to stop." Unless a vehicle is so marked that other motorists can clearly ascertain and be informed of the use of such vehicle for transporting school children the purpose of this section as a safety measure for school children would be defeated.

It is the opinion of this office that a motor vehicle, regardless of type or size, which is owned by a school district or which the administrative officers of the district have contracted to use for transporting school children shall be required to comply with Sec. 10327.1, Mo. R.S.A. (Laws of Missouri, 1949, p. 329) requiring the vehicle to be marked with the required signs and equipped with a signalling device as required by the statute.

Realizing that some vehicles are used for transporting school children on which it would be impractical or impossible to letter a sign on the front and rear of the vehicles the State Department of Education has recommended the use of placards on the front and rear of the vehicles attached to the body thereof during such time as the vehicle is being used to transport school children. These placards may be made of any durable material upon which lettering may be painted and attached to the motor vehicle.

CONCLUSION.

It is the opinion of this office that any motor vehicle, regardless of type or size, which is owned by a school district or for the use of which the administrative officers of the district has contracted, and is used for transporting school children shall be required to comply with Laws of Missouri, 1949, p. 329, requiring such vehicles to be marked with the specified signs and equipped with a signalling device as required by the statute.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney General

APPROVED:

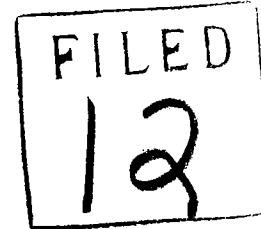
J. E. TAYLOR
Attorney-General

ROADS AND BRIDGES

} County Court has no authority to advance money to
} Special Road District organized under Article 11,
} Chapter 46, R. S. Missouri, 1939, for construction
} of a bridge.

February 20, 1950

FILED NO. 12



Honorable William F. Brown
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"One of the Special Road Districts in Pettis County, which is organized under Article 11, Chapter 46, has critical need for a bridge and have no money in their treasury. Their anticipated revenue for this year is \$600.00 and the estimated costs of the bridge is \$3,000.00.

"Our County Court has sufficient money and anticipated revenue to give them the required amount of assistance, however the County Court would like to be advised as to their right to advance the money to this Special Road District. If they are legally authorized to advance the money they would also like to be informed as to whether the money should be appropriated out of Class 3 or as an emergency appropriation out of Class 6."

Section 8714, R. S. Missouri, 1939, found in Article 11 of Chapter 46, provides:

"The county court shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging, to the districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give a receipt, and such

Honorable William F. Brown

commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

(Underscoring ours.)

We find no provision authorizing the county court to assist a special road district organized under Article 11 of Chapter 46, in the construction of bridges within such district. There is express provision for the county courts doing so insofar as special road districts organized under Article 10 of Chapter 46 are concerned. Section 8688 of that article provides:

"Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district: Provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts,

Honorable William F. Brown

or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

In the case of Lancaster v. County of Atchison, 180 S.W. (2d) 706, 1. c. 708, the court stated:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' Sturgeon v. Hampton, 88 Mo. 203, loc. cit. 213. Quoted with approval in the case of Morris et al. v. Karr et al., 342 Mo. 179, 114 S.W. 2d 962, loc. cit. 964.

"Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' * * *"

Inasmuch as the authority of the county court is limited in this matter, we feel that in view of the absence of any provision authorizing assistance to special road districts organized under Article 11 of Chapter 46, the county court has no authority to advance county funds to such road districts. Such being our view of the matter, there is no necessity for consideration of the question of the class of the county budget from which the funds might be advanced, if the county court had the authority to do so.

Honorable William F. Brown

CONCLUSION

Therefore, it is the opinion of this department that the county court has no authority to advance to a special road district, organized under Article 11, Chapter 46, R. S. Missouri, 1939, money for the construction of a bridge within such district.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SHERIFFS:

ELECTIONS:

Sheriff of third class county may appoint deputies to assist him in election duties. Sheriff fixes and is liable for payment of compensation to such deputies and is not entitled to be reimbursed for compensation paid deputies by county.

February 23, 1950

Mr. Herbert S. Brown
Prosecuting Attorney
Grundy County
Trenton, Missouri



2/23/50

Dear Sir:

This is to acknowledge receipt of your recent letter requesting an opinion of this department based upon questions arising from the interpretation of a previous opinion of this office which has been furnished you. It appears that the opinion upon which your present inquiries are based is opinion No. 64, dated March 24, 1949, and entitled: "Sheriffs: Elections: Sheriffs of third class counties may appoint deputies to assist him in election duties. Such deputies must look to Sheriff for their compensation." Your present request for an opinion reads as follows:

"Reference is made to your Opinion Number 64-49, dated May 24th, 1949, and rendered to Hon. J. P. Morgan, Prosecuting Attorney of Livingston County, Chillicothe, Missouri.

"Your office has heretofore furnished me with a copy of this opinion.

"In connection with the opinion furnished Mr. Morgan, I have the further and additional questions to submit to your office for opinion, and which are as follows, to-wit:

"(1) Does a Sheriff of the County of the Third Class appoint, with the approbation of the Judge of the Circuit Court, such deputies as may be necessary to properly perform the election duties formerly enjoined by law on the office of Constable, to elections that are purely township elections, as well as to a State-wide or County-Wide, election, such as a primary or general election? (In this connection, Grundy County, Missouri is a County operating under township organization.

Mr. Herbert S. Brown

"(2) In a State-wide or County-wide election, if the Sheriff of Grundy County, Missouri appoints, with the approbation of the Judge of the Circuit Court, such deputies as may be necessary to perform the election duties formerly enjoined by law on the office of Constable, does the Circuit Judge fix the rate of pay for such deputies for acting as a deputy on any election day, and if so, is the Circuit Judge limited to fixing the amount of pay for the deputy at \$3.00 per day, as is limited by Section 13339, Laws of Missouri, 1943, page 872, or can the Circuit Judge fix the amount of pay for each of said deputies at his discretion.

"(3) In a State-wide or County-wide election, if such deputies appointed to perform election duties must look for the Sheriff for their compensation, as is held in your Opinion Number 64-49, is the Sheriff, in turn, entitled to be recompensated out of the County Treasury?

"(4) In a purely township election, does the Township Board or the County Treasurer recompensate the Sheriff for any money paid by him to such deputies for performing election duties, and in a purely township election is the compensation of the deputies performing such election duties, limited to \$3.00 per day, or may the Circuit Court allow such deputies more than \$3.00 per day at his discretion?

"(5) Is the Sheriff entitled to any mileage expense incurred by him in notifying the deputies appointed of their appointment to act as a deputy on election day and that they are to perform the election duties formerly enjoined on Constables?"

We understand your first inquiry as referring to the right of a sheriff of a third class county to appoint deputies, with the approval of the circuit judge, to assist in the performance of certain election duties now required by law to be performed by the sheriff, and whether the appointment of such deputies may be for service in what has been termed "purely township elections," as well as those that are "state-wide" or "county-wide."

In the opinion referred to in the first paragraph of your letter it was held that the sheriff of a third class county might appoint, with the approbation of the circuit court such deputies as may be necessary to enable the sheriff to properly perform the election duties formerly enjoined by law on the constable. That it was unnecessary for a deputy to be present

Mr. Herbert S. Brown

at each voting place in the county and that such deputies must look to the sheriff for their compensation as they are not entitled to any salary.

The opinion referred to Section 1, Laws of 1945, page 1079, which provides that whenever the word "constable" should be used in any statute hereafter, it should be deemed to refer exclusively to, and to mean "sheriff."

Other sections of law referred to and which are pertinent to a discussion of the questions before us are:

Section 11489, R. S. Mo. 1939, which reads in part as follows:

"The sheriffs of their respective counties shall provide, at the expense of their counties, two ballot boxes for each precinct in each municipal township in said counties, and deposit the same with the constable of the proper township, whose duty it shall be to preserve the same, and have such boxes present at the proper time and place, at all elections in his township, for the use of the judges of the elections.

Section 11494, R. S. Mo. 1939, which reads as follows:

"The constable shall attend the elections in his township, and perform such duties as are enjoined on him by law, under the direction of the judges."

Section 13399, Laws of Mo. 1943, which reads in part as follows:

"Constables shall be allowed fees for their services as follows:

* * * * *

"For each day or part thereof required in erecting the booths, taking them down, and attending any election in his township, when required to do so by the judges of election, per day - - - - - \$3.00."

Mr. Herbert S. Brown

Section 13133, R. S. No. 1939, reads as follows:

"Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

None of the above statutes nor any others that we have been able to find place, place any limitation on the power of the sheriff to appoint deputies for election duties. For example, the statute does not say that the deputies appointed must possess any special qualifications, that the sheriff is entitled to a certain number, or that deputies appointed may only serve in a particular kind of election.

The words, "at all elections in his township," "attend the elections in his township," attending "any elections in his township," indicate that it was the duty of the constable, and under recent statutes the duty of the sheriff to attend every election in his county and perform whatever duties in connection with same the law enjoined on the sheriff.

It seems clear to us that the legislative intent in the enactment of laws in regard to the appointment of deputy sheriffs was not to provide a set of hard and fixed rules to govern in such matter but that the appointment of deputies was left within the sound discretion of the sheriff, subject however to the approval of the circuit judge of his county. We feel that such discretion was wisely given to the sheriff, for what officer could better determine the matter than he whom the law held responsible for the proper performance of election duties. It seems that the number of election duties to be performed by the sheriff and his need for assistance in the proper performance of same is of more significance than the kind of election held.

Since no statutes limit the power of the sheriff to appoint deputies to assist him in these duties it appears his appointment of deputies, subject to the approval of the circuit judge, is final.

Therefore, in answer to your first inquiry it is our opinion that the sheriff of a third class county may with the approbation of the circuit court appoint a sufficient number of deputies as in his discretion may be necessary to assist him in the performance of his election duties at any election that may be held in your county.

Mr. Herbert S. Brown

Your second inquiry is whether or not the compensation of those deputies appointed for election duties in your county in connection with a "state-wide" or a "county-wide" election is to be fixed by the circuit court. That in the event it should be held that the circuit court has the power to fix the compensation of such deputies, whether the court is limited to the sum of \$3.00 per day for each deputy serving on election day in accordance with the provisions of Section 13399, Laws of 1943, page 872, or whether the court may fix such compensation at some other sum.

The opinion now under discussion refers to Sections 1, 2 and 3, Laws of 1945, page 1562, and states that under the provisions of Section 2 of the Act, a sheriff of a third class county may appoint deputies with the approbation of the circuit court, as may in the discretion of that court be sufficient to assist the sheriff in the proper performance of his duties relating to the enforcement of the criminal laws of the state and that the court may fix the compensation of the deputies so appointed.

It appears that under the provisions of this act, deputies can only be appointed and paid to assist the sheriff in criminal matters and are not entitled, and the law makes no provision for their compensation in civil matters. However, in the opinion it was held that under the provisions of 13133, R. S. Mo. 1939, supra, the sheriff may, with the approbation of the circuit court, appoint one or more deputies for civil duties but that deputies appointed under the authority of this section would be allowed no salary and must look to the sheriff for their compensation.

Under the provisions of Section 13399, supra, the constable received the sum of \$3.00 per day or part thereof for the performance of election duties in his township and it is noted that the fee was for services rendered in but one township of the county in which the constable resided. Under the provisions of the present law the sheriff is now required to perform the election duties formerly performed by the constable but in each and every township of the sheriff's county. Since such duties are civil in nature, the sheriff would be entitled to a fee of \$3.00 per township for each day or part of day in which said services were performed. The deputies who assist him in such performance would receive no part of said fee but will receive only such compensation as is paid to them by the sheriff.

Mr. Herbert S. Brown

In answer to your second inquiry, it follows that in view of the foregoing reasons the circuit judge has no authority to fix the compensation of deputies appointed to assist the sheriff in the performance of his election duties in connection with "state-wide" or "county-wide" elections held in your county. That such duties are civil in nature and the sheriff must compensate his deputies for services rendered in connection with said elections.

Your third inquiry is whether or not the sheriff is entitled to be reimbursed out of the county treasury for compensation paid by him to his deputies appointed to assist him in the performance of his election duties in a "state-wide" or "county-wide" election, and bearing in mind the previous opinion of this office that deputies appointed for election duties are to look to the sheriff for their compensation.

In discussing this inquiry we desire to call attention to the following cases which state the general rule now prevailing in Missouri with reference to the payment to an officer of compensation for his services or that of his assistants.

In the case of Nodaway County vs. Kidder, 129 S.W. (2d) 1.c. 860, the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment.
* * *"

Also in the case of Alexander vs. Stoddard County, 210 S.W. (2d) 108, it was held to be the general rule that compensation for services rendered by assistants, deputies and other employees of county officials can be allowed directly to them or their superiors only if authorized by law, and where no provision is made for payment, or appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement.

Mr. Herbert S. Brown

Applying the principles laid down in above cases to the question before us, it appears that if your sheriff is to be reimbursed for compensation paid deputies for assistance in elections, it is the duty of the sheriff to show those statutes authorizing him to be reimbursed at the expense of his county. It is also noted in this connection that any such statutes that might be cited by the sheriff to sustain his contention will be strictly construed against him, and that in the absence of such a showing the sheriff claiming fees not authorized by statute will be deemed to have performed them gratuitously.

There being no statutory provisions that authorize the county to reimburse the sheriff for expenditures of this nature, the sheriff is not entitled to be reimbursed by the county.

In answer to Question Number 4, in view of what has been said above, neither the Township Board nor the County Treasurer have any legal authority and cannot reimburse the sheriff of your county for money paid to his deputies for services in connection with elections held in your county. The sheriff and not the circuit court fixes and is liable for compensation of the deputies for such services.

In answer to your last inquiry, it appears that since there is no statute which provides that the sheriff shall be allowed fees and mileage expenses incurred in notifying deputies appointed to assist the sheriff in the performance of election duties, that the sheriff is not entitled to such fees or mileage.

CONCLUSION

It is therefore the opinion of this department that a sheriff of a third class county may appoint with the approbation of the circuit court such deputies as may be necessary to enable him to properly perform election duties now enjoined on him by law at every election held in his county. That such deputies are not entitled to any salary and the circuit court is not authorized to fix their compensation. That the sheriff is not entitled to be reimbursed at the expense of the county for money paid by him as compensation to his deputies for their assistance in performing the election duties, and that the sheriff is also not entitled to be reimbursed for any traveling expenses incurred by him while notifying those deputies appointed to assist him in his election duties.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
ATTORNEY GENERAL

PNC:nm



COUNTY COURTS:

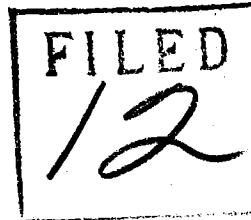
County Court has no authority to close a public road to permit strip mining, in a county under township organization.

ROADS:

April 11, 1950.

4/13/50

Honorable Barkley M. Brock,
(Acting) Prosecuting Attorney,
Henry County,
Clinton, Missouri.



Dear Mr. Brock:

We have your recent request for an opinion from this office. Your letter is as follows:

"Will you please advise if in your opinion the county court now has jurisdiction to temporarily close roads in order that coal companies may strip the coal under the public road? I, of course am familiar with the decision of the Supreme Court holding that the County Court has no discretionary powers and therefore has no authority to close a public road. This appears to be true, because of the failure of the new constitution to grant discretionary powers to the County Court. I have been asked if this can be applied to the situation where public roads are temporarily closed. In our county there are many instances where public roads have been temporarily closed by the County Court in order that the coal could be stripped thereunder. After the coal is stripped, the roads are restored.

"Would you please advise if in your opinion the County Court has this authority in view of the provisions of the new constitution?"

You refer to a recent opinion of the Supreme Court holding "that the County Court has no discretionary powers." We assume you have in mind the recent case of Rippeto et al. v. Thompson 216 S.W. (2d) 505, where it is stated as follows, l.c. 507:

"But this has now been changed. Under the new Constitution (1945) judicial power is no longer vested in county courts. Article V, Section 1,

Hon. Barkley M. Brock:

April 11, 1950.

omits county courts in enumerating the courts in which the judicial power of the state is now vested, Article VI of the new Constitution (1945) which concerns local governments, not courts, provides in part in Section 7 that the county court 'shall manage all county business as prescribed by law.' Although that section provides that a county court shall 'keep an accurate record of its proceedings', it did not carry over the old provision that a county court shall be 'a court of record.'

"Thus, it is clear under the new Constitution (1945) county courts are no longer vested with judicial power, are not now 'courts of record' and are not what we generally know as courts of law. 'County courts are no longer courts in a juridical sense, but are ministerial bodies managing the county's business.' State ex rel. Kowats v. Arnold, 356 Mo. 661, 204 S.W. (2d) 254, 258; Bradford v. Phelps County, Mo. Sup., 210 S.W. (2d) 996, supra."

However, in the very recent case of State ex rel. Lane v. Pankey et al. 221 S.W. (2d) 195 the Supreme Court, en banc, held as follows, 1.c. 196, 197:

"* * * The county court proceeding is in conformity with Sections 8473 to 8478, both inclusive, Revised Statutes Missouri 1939, Mo. R.S.A., which purport to vest in the county court exclusive authority to establish and maintain public roads.

* * * * *

"Respondents, while conceding that county courts no longer have judicial power and that some phases of the establishment of public roads involve the exercise of judicial or quasi judicial power, contend that the new constitution does not invalidate the above statutes. Their reasoning is: that the main features of the establishment and maintenance of public roads are administrative county business and that Section 7, Article VI, of the new Constitution, Mo. R.S.A., gives the county court exclusive authority to transact all county business.

Hon. Barkley M. Brock:

April 11, 1950.

* * * * *

"They are also correct in asserting that many of the functions connected with the establishment and maintenance of public roads, properly fall within the term 'county business' as used in the Constitution. But when it becomes necessary to exercise the power to eminent domain to take private property for the purpose of a road, either public or private, the judicial power of a court must be invoked. To that extent our decision in the Rippeto case is pertinent to the issues in the instant case.

* * * * *

"The new Constitution, as construed in the Rippeto case and as we now construe it, invalidates no provision of existing statutes relating to the authority of county courts over public roads except such as purport to authorize the county court to exercise judicial power.

* * * * *

"But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads."

(Underscoring ours)

The language in the above case indicates clearly that the Supreme Court of this state believes that no step in the opening of a public road, except that of adjudging the amount of compensation in condemnation proceedings, encompasses the exercise of judicial power. A fortiori, the closing of a public road would involve no exercise of judicial power.

It is made equally certain by the Lane case, supra, that all existing statutes, concerning the authority of the county courts over county public roads, which do not entail the exercise of judicial functions by said county courts, are not invalidated by the

Hon. Barkley M. Brock:

April 11, 1950.

new Constitution or by the Rippeto case, supra.

In summary, then, we see that county courts have, under the new Constitution and the decision in the Rippeto case, no judicial powers. However, the Supreme Court of this state has ruled, in the Lane case, that the establishment and maintenance of public roads, with the exception noted above, does not involve the exercise of judicial powers. It is, of course, perfectly obvious that closing a public road involves, if anything, less judicial discretion than the creation of a road. The court has also held that existing statutes concerning the powers of county courts over county roads are valid insofar as they do not require said "courts" to use judicial discretion.

We note, however, that Henry County is under township organization. This latter fact is of utmost significance here because the applicable statute in such counties, Section 8860 R.S. Mo. 1939, providing as follows:

"Sec. 8860. Where coal or other valuable mineral underlies any public road in this state that has not been designated as a state highway or is not under the control of the state highway department, if said coal or other mineral is being mined on or from adjoining lands by the 'strip pit' or surface process of mining, the commissioners of any special road district or the township board of directors if said road be not located in a special road district, may provide for the temporary abandonment of said road and the removal or mining of said coal or other valuable mineral underlying said road and the rebuilding of said road, in the manner and under the conditions provided in this article, when in the opinion of said commissioners or township board the public good would best be served thereby."

clearly vests the power to close public roads for strip mining, not in the county court, but, explicitly in the road district commissioners or in the township board. Therefore, in your county and in all others under township organization, the county court has no authority to temporarily close a public road to permit strip mining.

CONCLUSION

It is, therefore, the opinion of this office that the

Hon. Barkley M. Brock:

April 11, 1950.

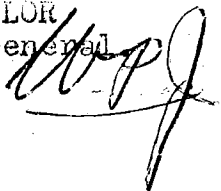
county court, in counties under township organization, has no power to temporarily close a public county road in order to permit strip mining, but said power is vested in the commissioners of any special road district, or in the township board of directors, if said road is not located in a special road district.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
Attorney General

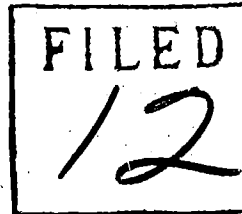


HJD:cg

SCHOOLS: Property of school districts annexed to a
TAXATION: consolidated district subject to taxation
to discharge pre-existing bonded indebted-
ness of consolidated district.

April 27, 1950

Honorable William F. Brown
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"Several years ago the Green Ridge Consolidated School District No. 4 passed a bond issue.

"Since that time, under the new provision for consolidation, several adjoining districts were added by consolidation. Residents and taxpayers of these added districts are somewhat concerned over the possibility of additional taxes being levied to pay off the bonded indebtedness of the original consolidated school district.

"Will your office please give this office an opinion as to whether or not the residents and taxpayers of the added districts become liable for the bond indebtedness of the original consolidated school district."

A similar situation exists in connection with consolidated school districts in the matter of holding a consolidated school district liable for the indebtedness previously incurred by component school districts which are included in and become a part of a consolidated district. The courts of this state have held that a consolidated district is liable for the previously

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incurred debts, including bonded indebtedness of its component districts. In State ex rel. School District v. Smith, 343 Mo. 288, 121 S.W. (2d) 160, the court was considering the question of liability of a consolidated school district for the previously incurred bonded indebtedness of its component districts. In ruling on the question the court said at S.W. 1.c. 163:

" * * * Upon consolidation the identities of the component districts fade and disappear completely and in their stead emerges a new entity in the form of the consolidated district. This new entity spontaneously becomes the owner of the properties and liable for the old debts. The fact that some persons and some property embraced in the limits of the consolidated district are required to pay more taxes than they would have had to pay had the districts not been consolidated cannot be considered a constitutional factor in preventing the consolidation of the districts in view of the power of the legislature to do so. It is no constitutional objection, says Dillon, 'that the property brought within the corporate limits (by annexation) will be subject to taxation to discharge a pre-existing municipal indebtedness since this is a matter which, in the absence of such constitutional restriction, belongs wholly to the legislature to determine.' 1 Dillon on Municipal Corporations, 5th Ed. Sec. 355."

Other Missouri cases in accord with the above case are: Boswell v. Consolidated School Dist., 10 S.W. (2d) 665; Thompson v. Abbott, 61 Mo. 176; Abler v. School Dist., 141 Mo. App. 189, 124 S.W. 564.

We might further point out that Section 10498, R.S. Mo. 1939, provides that all bonds outstanding against the component school districts shall become debts against the consolidated districts. However, there are no statutes pertaining to the property brought within a school district by annexation or consolidation being subject to taxation to discharge pre-existing indebtedness of the subsisting district. We must, therefore, look to the common-law rule.

Regarding municipal corporations, the rule is stated as follows in Volume 43 C.J., Section 122, page 143:

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"Debts of a municipality contracted before an annexation of territory become a burden upon the added territory as well as upon the original territory, in the absence of statutory provision to the contrary. * * *"

And, regarding school districts, the following appears in Volume 56 C. J., Section 856, page 732:

"Property in territory annexed is liable to assessment for the payment of bonds and liabilities of the annexing district existing previous to the annexation, and no express statutory provision is necessary to impose such liability."

The question you have presented was directly ruled on in *Adriaansen v. Board of Education*, 222 App. Div. 320, 226 N.Y.S. 145. In deciding the question the court said at N.Y.S. l.c. 149, 150:

"The law applicable to such a situation, as stated in many authorities, is that property in the territory annexed is liable to assessment for the payment of bonds and liabilities of the municipal corporation or district to which the territory is annexed. The authority of the Legislature over the boundaries of subdivisions of the state is absolute. It may consolidate, add to, or take from the territory of a municipality or district, without the consent of the municipality or district affected. By such action the rights of individuals in the territory affected are not violated. The fact that persons and property in the territory annexed may be subject to taxation to pay bonds and obligations theretofore voted, without their having had any voice or vote in creating the liability, does not render the act of annexation void. There is no contract between citizens of a particular municipality and the corporation that the property within the particular territory shall not be taxed for the benefit

Honorable William F. Brown

of another municipal corporation or district to which it may be annexed, even though the tax is assessed to raise money to pay bonds or obligations voted and incurred by the municipality or district before the annexation. * * *

We might further point out that in the above case there was a statute similar to Section 10498, supra, imposing liability on the subsisting or enlarged district for the bonded indebtedness of the component districts, but there was no statute relating to the liability of annexed districts for pre-existing bonded indebtedness of the subsisting district. The court, in making its decision, said that the common-law rule prevailed.

It would further seem that the component districts of a consolidated district or school districts annexed to a consolidated school district which derived benefit by virtue of becoming a part of said consolidated district, and which may derive benefit from facilities for which said bond indebtedness was incurred, should be liable in discharging said indebtedness.

CONCLUSION.

In view of the foregoing, it is the opinion of this department that property within the school districts added or annexed to a consolidated district would be liable to assessment and subject to taxation for the payment of bonded indebtedness previously incurred by the consolidated district.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

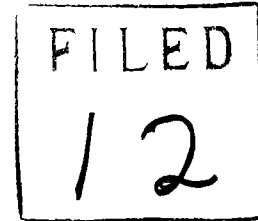
APPROVED:

W. E. TAYLOR
Attorney General

RFT:ml

COUNTY BUDGET LAW: County Clerk cannot countermand orders of County Court in budget matters.

June 6, 1950



Honorable William F. Brown
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The question has arisen in this County as to the nature and extent of the County Clerk's authority as Budget Officer, in Counties of the Third Class.

"Our County Clerk assumes the position that he is the sole arbiter in matters affecting the budget, and has either directly or in effect, countermanded the orders of the County Court in respect to the payment of items provided in the budget.

"If I understand the situation correctly, a County Clerk in Counties of the Third Class is the Budget Officer for the purpose of preparing the budget under the direction of the County Court and in conformance with their orders in the matter.

"I will appreciate an opinion from your office clarifying this matter especially with reference to whether or not the County Clerk has the authority to countermand the orders of the County Court in budget matters."

Section 10910, Laws of Missouri, 1945, page 610, provides in part as follows:

" * * * The clerk of the county court of the several counties of this state shall

Honorable William F. Brown

be the budget officer of such county and as such shall prepare all data, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of this article but no failure on the part of the clerk of the county court shall in any way excuse the county court from the performance of any duty herein required to be performed by said court. The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Other provisions of the county budget law deal with the duties of the county clerk in the preparation of the county budget. Section 10912, R. S. Missouri, 1939, requires the county officials to submit their annual estimates to the county clerk. Section 10913, R. S. Missouri, 1939, requires the county clerk to prepare and spread on the docket of the county court certain information required in order to prepare the county budget. Section 10917, R. S. Missouri, 1939, requires the county clerk to enter on the record of the court the budget, after it has been revised and approved by the county court. The county clerk is also required to file a certified copy of the budget with the county treasurer and to forward a certified copy to the State Auditor.

These provisions, which are the only ones dealing with the duties and authority of the county clerk in matters relating to the county budget, impose upon the county clerk only certain ministerial duties in connection therewith.

Section 7 of Article VI of the Constitution of Missouri, 1945, provides that the county court "shall manage all county business as prescribed by law." The county budget law has carried out this plan of operation of the county business. Section 10911, R. S. Missouri, 1939, requires the county court to classify expenditures in the six specified classes. Section 10914 requires the county court to show the estimated expenditures for the year by classes. Section 10917 provides for the final approval of the budget by the county court as follows:

"It is hereby made the first duty of the county court at its regular February term

Honorable William F. Brown

to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. * * *

Thus, it is seen that the matter of final approval of the county budget is left to the county court.

Cases dealing with the county budget law have not expressly passed on the question presented by you, but all have recognized that the county court is the body charged with the responsibility of administering the county affairs in accordance with the county budget act. In the case of Bradford v. Phelps County, 210 S. W. (2d) 997, at l. c. 999, the court stated:

" * * * County courts as the managerial agents of the county have the duty to so manage the county's fiscal affairs as to comply with Section 26, Article VI, Constitution of Missouri, 1945, providing (inter alia) limitations on indebtedness of local governments. * * * It is evident from the language of the County Budget Law that county courts in complying with the Law have duties of a discretionary nature in examining, revising and changing the estimates of the county's expenditures to the end of promoting the standard of 'efficiency and economy in county government,' Section 10917, supra. In giving such discretionary managerial powers and duties to the county courts, the Legislature has not provided an appeal whereby a circuit court may review the county court's acts in the exercise of its discretion and whereby the circuit court can substitute its own independent judgment."

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In that case the court further stated at l. c. 1001:

"We have noticed the Legislature has seen fit to delegate to the county court discretionary powers and duties under Section 10917 of the County Budget Law--the county court can be said to be 'the agency most familiar with the fiscal affairs and financial condition of the county' (State ex rel. Dietrich v. Daues, supra; State ex rel. Dwyer v. Nolte, supra), as well as the agency most likely to soundly budget estimated receipts and expenditures to the end of efficiency and economy in county government. * * *"

We find no statutory provision authorizing the county clerk to interfere in any way with the county court's exercise of its powers under the county budget law. The clerk is a ministerial officer with certain ministerial functions to perform in connection with the budget, and although he is designated as the budget officer, he is not authorized in any regard to countermand the action of the county court in budget matters.

CONCLUSION

Therefore, this department is of the opinion that the county court is the body charged with the management of the county's affairs under the county budget law, and that the county clerk as budget officer performs only ministerial duties in assembling the estimates required to be submitted to him and in entering the budget of record after its approval. He has no authority to countermand the orders of the county court in budget matters.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

EASEMENT: Easement in real estate may not be acquired by adverse possession but may
TITLE BY PRESCRIPTION: be acquired by prescription by continuous subjection of servient estate to
VESTED IN PETTIS COUNTY: uses for which the easement is intended for a period in excess of ten years. The unorganized public cannot obtain fishing rights by prescription. Right to take fish resides in owner of land occupied by water, except in cases where land and water are owned by different persons, then right exists in the owner of the water.

December 27, 1950

Honorable William F. Brown
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Mr. Brown:

We are in receipt of your recent letter requesting an opinion of this department. Your letter is as follows:

"I shall appreciate it if you will give me your official opinion with respect to the rights of the public and of the State of Missouri and of Pettis County relative to the following:

"On the 17th day of October, 1936, Ernest E. Breisch and Margaret G. Breisch, husband and wife, executed the 'Easement and Dedication' of which the enclosed is a full copy. It is particularly called to your attention that the land upon which the easement was granted was described as being in the Northwestern part of the Northwest Quarter of the Southeast Quarter of Section 31, Township 44, Range 22.

"For some reason unknown to me, the lake was not constructed on any part of the Northwest Quarter of the Southeast Quarter of Section 31, Township 44, Range 22, but a lake was constructed with the use of W.P.A. labor on the Northwest Quarter of the Northeast Quarter of Section 31, Township 44, Range 22, said last described land being also the property of Ernest E. Breisch and Margaret G. Breisch, husband and wife. There has never been recorded in this county any conveyance of an easement or dedication for a lake on the tract where the lake was in fact constructed.

"Mr. and Mrs. Breisch no longer own the land but by a series of conveyances the land now belongs to one Kerfoot. While the land still belonged to Mr. and Mrs. Breisch the State Conservation Commission stocked the lake with fish and many people from various parts of the county (and perhaps elsewhere) have in the past, without seeking any permission from any proprietor, made use of the lake for fishing and swimming.

"Of comparatively recent date Mr. Kerfoot has erected at the premises signs to the effect that the property is private property and directing people to 'keep out'. Mr. Kerfoot contends, first, that there was never any grant of an easement for the construction of the lake at the site where the lake was built, and second, that even if the public has any rights at all in and about the premises the rights of the public are confined to the removal of water from the reservoir when and if (but only when and if) the County Court of the County shall declare that a drought condition exists.

"It has been suggested that the Prosecuting Attorney owes to Mr. Kerfoot the aid of his office to prevent or to punish the repeated acts which Mr. Kerfoot contends are trespasses. On the other hand, those persons who are interested in the contrary view call attention to the wording of the dedication which tends to indicate a very broad dedication to the State of Missouri for the use and benefit of the public, and at another place in the deed of easement the dedication is to the County of Pettis for the use and benefit of the public.

"Specifically, will you give me your opinion in answer to the following:

"1. Does the fact that the lake in question was constructed with W.P.A. labor (and most likely as a part of the water conservation program) have the effect of imposing upon the land any easement or rights in favor of the county, the state or the public, even though the lake was not constructed on any land upon which an easement was granted by any deed now appearing of record.

"2. If your opinion is that the county, the state and the public have any rights in the premises, are the rights of the public confined to entering the property to remove water in the event a state of drought

condition shall be declared to exist by the County Court, or are the rights of the public general to such extent that all members of the public may enter at will to fish, swim, etc."

We comment that examination of the facts stated in your original letter and your supplementary letter under date of December 11, 1950, and examination of the copy of the grant transmitted therewith show the following facts:

(1) There was a grant from the owners of the northwest quarter of the southeast quarter of Section 31, Township 44, Range 22 in Pettis County, Missouri, of an easement for the creation and maintenance of a lake on said property for reservoir purposes as a part of the water conservation program of the State of Missouri and the United States Government, said grant being to the County of Pettis for the use and benefit of the public.

(2) No lake was ever constructed on said northwest quarter of the southeast quarter of Section 31, but almost immediately after the date of the aforesaid grant the W.P.A. did construct a lake on the northwest quarter of the northeast quarter of said Section 31, which land was then owned by the same persons who owned the land as to which the easement hereinabove mentioned had been granted.

(3) There is no record of any conveyance of an easement to Pettis County for the creation and maintenance of the lake hereinabove mentioned and now existing.

(4) The Conservation Commission of the State of Missouri has stocked the lake with fish.

(5) The present owner of the land on which the lake is located denies that either Pettis County or any members of the public have any rights whatsoever in connection with this lake and denies the existence of any fishing rights vested in the public.

(6) The existing lake was constructed soon after October, 1936, and certainly much more than ten years ago.

(7) The practice of fishing and swimming in the lake by members of the public generally and apparently without asking permission from anyone has been common ever since the lake was constructed and certainly for more than ten years.

We are of the opinion that the fact that as shown by the grant of easement referred to above it was intended that the W.P.A. should construct a reservoir as a part of the water conservation program of

the United States Government and the State of Missouri for the County of Pettis for the use and benefit of the public, coupled with the fact that it did, shortly after the date of the aforesaid grant, create the existing reservoir, gives rise to a presumption, rebuttable only by evidence to the contrary, that the existing reservoir was created by the County of Pettis for the use and benefit of the public.

We are of the further opinion that the facts above deduced show that the waters of this lake have occupied the ground covered thereby continuously for a period of time considerably in excess of ten years. We are therefore of the opinion that Pettis County has used the land occupied by the waters of this lake for lake purposes continuously for a period in excess of ten years.

Taking into consideration the facts above set forth, we must consider the following questions:

(1) Has the County of Pettis in its capacity as trustee for the public acquired an easement for lake purposes in the land occupied by the lake either by adverse possession or by prescription?

(2) If it has acquired such easement either by adverse possession or prescription, does the county as trustee for the public own the water in the lake?

(3) Has the public, by reason of the fact that many persons have fished in the lake from time to time for a period far in excess of ten years, acquired title by prescription to fishing rights therein?

(4) If the county is the owner of the water in the lake for the use and benefit of the public, does that fact alone entitle the public to fish in the lake?

(5) If the public has a right to take the fish in the lake because the county as trustee for the public owns the water in the lake can the right of ingress and egress, for fishing purposes, to and from the lake over the land adjacent thereto be implied therefrom?

In connection with question No. 1 above, which is whether or not the county, in its capacity as trustee for the public, has acquired an easement for lake purposes in the land occupied by the lake either by adverse possession or by prescription, we first allude to the fact above stated that the land occupied by the lake has been so occupied for a period of time considerably in excess of ten years, and second, we quote the following from Section 1002 R.S.A. Mo. 1939:

"No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action."

We are of the opinion that the above quoted section does not directly apply to the facts above stated in such a way as to give the county an adverse possession title to an easement for the use of the land occupied by the reservoir. We are of this opinion for two reasons, (1) this statute specifies actions for the recovery character is not classed as a hereditament but as an incorporeal hereditament and (2) for the reason that it seems to have long been the doctrine of the common law, adhered to by the decisions of the Supreme Court of Missouri, that an easement cannot be acquired by adverse possession for the reason that adverse possession must be exclusive possession of the land, whereas an easement in land is not necessarily dependent upon exclusive possession, the owner of the fee being entitled to use the land for purposes not connected with or inconsistent with the easement, and the owner of the easement being entitled to use the land only for the purposes of the easement. However, while title to an easement cannot be acquired by adverse possession, the Missouri decisions have held that it may be acquired by prescription. Title by prescription is based on the common law doctrine of "Lost Grant," in other words, because of the fact that the person who claims an easement has used the land for a long period of time without interruption by the owner of the fee, the law presumes that the owner or his predecessor in title has at some time in the past made a valid grant of the right claimed and that that grant has been lost. The Missouri decisions have held that, since title to easement may be acquired by prescription by the lapse of a long period of time without protest against the use of the land for the purposes of the easement by the owner of the fee, it is logical to fix the time required for the acquisition of such title by prescription in accordance with the time provided by the adverse possession statute, which, as indicated by the section quoted above, is ten years.

The propositions which we have hereinabove stated are supported by the Missouri decisions in the case of *Boyce v. Missouri Pacific Ry. Co.* 168 Mo. 583, 68 S.W. 920, and also in the much later case of *Riggs v. Springfield*, 344 Mo. 420, which last cited case cites

the Boyce case with approval. In the Boyce case, supra, it was decided by the Court that a railroad company, which had constructed its railroad across a tract of land without any kind of a grant or verbal permission whatever from the owner of the fee and had maintained its railway track on said land far in excess of ten years, had acquired title to an easement for railroad purposes by prescription. The following is a quotation from the Boyce case, supra:

"It is with this in mind that the first contention of the plaintiff, that the statute of limitations does not apply to easements, must be considered.

"Originally in England, easements were said to lie wholly in grant. Easements are incorporeal hereditaments, and statutes of limitation were held to apply only to actions for the recovery of land. Afterwards the fiction of a 'lost grant' was adopted by the courts. That is, the courts presumed from the long possession and exercise of right by the defendant, with the acquiescence of the owner, that there must have been, originally a grant by the owner to the claimant, which had become lost. 'It was called a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring proferet.' (Railroad v. McFarlan, 43 N.J.L. 605.) It was considered the duty of the court to enforce the fiction, 'not, however, because either the court or the jury believe the presumed grant to have been actually made, but because public policy and convenience require that long-continued possession shall not be disturbed.' (Jones on Easements, sec. 161, p. 138.) Pollocak, B., in the recent case of Bass v. Gregory, 25 Q.B.D. 481, decided in 1890, said the fiction of 'lost grant' has been adopted by almost all civilized nations for the furtherance of justice and the sake of peace. Formerly it was held to apply only to cases where the defendant claimed a right to possession by prescription, that is that his right began at a period beyond the 'time whereof the memory of man runneth not to the contrary.' Lately in England and in most of the United States the rule has been adopted that the period for acquiring an easement in lands corresponds to the local statute of limitations as to land.

For it was said, 'It would be irrational to hold that an easement may not be acquired by the same lapse of time required to confer title to the land by adverse possession.' (Jones on Easements, sec. 160, p. 134, and cases cited in notes.) And this is the doctrine ably announced by Ellison, J., speaking for the Kansas City Court of Appeals, in House v. Montgomery, 19 Mo. App. 1.c. 179, after an exhaustive review of modern authorities.

"Hence, while statutes of limitation do not directly apply to actions in which easements or other incorporeal hereditaments are involved, still by judicial construction an adverse user of an easement for the period specified in the statute barring actions for the recovery of lands, is now by analogy held to be a conclusive judicial presumption of a prescriptive right, by a lost grant. (Jones on Easements, secs. 161, 172, and cases cited; 10 Am. and Eng. Ency. Law (2 Ed.), p. 426, and cas. cit.) It is the accepted rule however, that, 'the user, to perfect title by prescription to an easement, must be exercised by the owner of the dominant tenement and must be open, peaceable, continuous, and as of right.' (Railroad v. Bloomington, 167 Ills. 9; Conyers v. Scott, 94 Ky. 123; Swan v. Munch, 65 Minn. 500; Hoyt v. Carter, 16 Barb. 212 Bushey v. Santiff, 86 Hun 384; Costello v. Harris, 162 Pa. St. 397.)

"This doctrine was recognized by this court in Pitzman v. Boyce, 111 Mo. 387, and it was there said, 'And such adverse user for the statutory period will give origin to the rebuttable legal presumption of a grant, even though the use in its inception was a trespass.' * * *"

We are of the opinion that the doctrine enunciated in the portion of the opinion above quoted is applicable to the facts set forth in your letter and we are therefore of the opinion that in view of the fact that the land in question has been occupied by the county for reservoir purposes for more than ten years the county has acquired title by prescription to an easement for that purpose.

We are of the further opinion that since the lake was constructed for the county by the W.P.A. for the use and benefit of the public and, since the county has acquired title by prescription to an easement in the land occupied by the lake for lake purposes,

the county, as trustee for the public, owns the lake and the water therein.

We shall next consider our above question No. 3 which is, "Has the public by reason of the fact that many persons have fished in the lake from time to time for a period far in excess of ten years, acquired title by prescription to the fishing rights therein?" While we find no Missouri decisions on this subject, we are of the opinion that the public has not acquired that right by prescription. The following is a quotation from the opinion of the Supreme Court of Connecticut in the case of *Turner v. Selectmen of Hebron*, 61 Conn. 175, 1.c. 187:

"Nor could the unorganized public, as such, acquire the right of fishing there either by grant or prescription. A deed or devise to the unorganized public by that name would be void for uncertainty. And there can be no prescription where there can be no grant. *Mervin v. Wheeler*, 41 Conn., 23; *Pearsall v. Post*, 22 Wend. 425; *Washburn on Easements*, 119; *Rogers v. Brenton*, 10 Q. Bench, 26. Doubtless any member, or each member, of the unorganized public might obtain the right of fishing in that pond in either of the ways mentioned. There is no suggestion of any grant. The right which the committee say was exercised by all the members of the great unorganized public was 'to fish in the pond at all seasons of the year, in boats during the spring, summer and fall, and through the ice in the winter.' If the right so exercised had been completely acquired by long use it would be a right in the nature of a profit a prendre in alieno solo, and must have belonged to each member in gross. The facts show that the right was not exercised as appurtenant to a freehold. Such a right is a mere personal one; it cannot be assigned and it does not descend to heirs."

The above case is cited in support of the proposition that the unorganized public cannot obtain title by prescription to fishing rights by *Jones on Easements*, Section 79, page 62. We are of the opinion that the unorganized public cannot obtain title by prescription to fishing rights, although an individual might acquire such title by continuous exercise of the practice of fishing for a period of ten years.

We have hereinabove expressed the opinion that the County of Pettis in its capacity as trustee for the public is the owner of the water in the lake. Since that is true, we are of the further opinion that members of the public, as beneficiaries of the trust, have the right to take the fish in the lake. In this connection we quote Section 60 of Jones on Easements, page 46, as follows:

"The right to take fish in any water not navigable prima facie belongs to the owner of the soil over which the water flows or stands; for the ownership of the soil in ordinary cases carries with it the ownership of the water. But when the ownership of the water is in one person and the ownership of the soil under the water is in another the right of fishing in the water belongs to the former, for he owns the element in which alone the fish can exist. (Underscoring ours.)

"The mere fact that one owns land along the shore of a pond which belongs to another gives him no right to fish in the pond.

"A custom to take fish in alieno solo is not a good custom.

"The right of fishing in navigable waters is common to all, except when an exclusive right has been acquired by grant or prescription.

"But the owner of the soil which is flowed by the water of a pond has no right to fish in such water, when he has released all easements, privileges, and rights in the pond except the right to use a certain quantity of water from it for a mill. Such a release cuts off the right to fish and the releasor cannot thereafter claim such right as incident to his ownership of the soil under the pond."

However, we are of the further opinion that, although the members of the public, as beneficiaries of the county's trusteeship, have the right to fish because of the ownership of the water in the lake by the county, they do not have the right of ingress and egress to and from the lake, for the purpose of fishing, for the reason that the county's ownership of the lake, as trustee for the public, is for reservoir purposes and, while there is, incident to the ownership of the water, the right to take the fish out of the lake, nevertheless the county's easement in the land acquired by prescription was limited to the purposes

for which the lake was constructed and was acquired by reason of the occupancy of the land by the waters of the lake for the time necessary for the acquisition of title by prescription and also by the exercise of the right of ingress and egress over the land not occupied by the water when necessary for the use of the lake for the intended reservoir purposes and, since the fishing rights of the public exist only as an incident to the county's ownership of the lake and are not and could not have been acquired by prescription, neither has the public, nor could it have acquired title by prescription to an easement for ingress and egress to and from the lake over land not occupied by the water for the purpose of fishing.

CONCLUSION

We are accordingly of the opinion that the County of Pettis, in its capacity as trustee for the public, owns the lake with all rights incident to that ownership, including fishing rights therein and has acquired title by prescription to an easement in said land covered by the lake for lake purposes and that members of the public, as beneficiaries of the trust, have equitable title to the lake and to the aforesaid easement and also to the fishing rights, but have no right of ingress or egress for fishing purposes over the land not occupied by the lake, although they do have the implied right of ingress and egress if necessary for reservoir purposes.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION SALES

} Sales by wholesaler to purchaser not coded and paying
Sales Tax should be considered sale at retail and
burden is upon seller to show otherwise.

January 13, 1950



Mr. W. H. Burke
Assistant Supervisor
Sales Tax Unit, Department of Revenue
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Our St. Louis Sales Tax Office claim that if a sale is made to a party in the state of Missouri who is not coded and paying sales tax, he must be considered as a user and consumer and pay sales tax on his purchases of merchandise from a wholesaler. With the exception of a wholesaler selling to another wholesaler who makes no sales except to jobbers or retail merchants;-- can we apply this rule generally?

"Also, when the above wholesaler sells merchandise to a customer outside of the state of Missouri, can we demand that he furnish a code number showing that he is paying sales tax in his state, or selling only to sholesalers who in turn sell to jobbers and retailers? If this is legal it will simplify our sales for resale problem considerably."

Section 11408, R. S. Missouri, 1939, (re-enacted Laws of 1947, Volume I, page 546) imposes a two percent tax upon every retail sale in the state of tangible personal property. Section 11407 (g) (amended Laws of 1947, Volume I, page 535) defines sale at retail as follows:

"'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or

Mr. W. H. Burke

title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; * * *

Section 11420, R. S. Missouri, 1939 (re-enacted Laws of 1947, Volume II, page 431) provides in part that:

"The burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail, shall be upon the person who made the sale, * * *"

In view of the burden of proof, which is imposed upon the seller by Section 11420, we feel that your office may consider a sale by a wholesaler to a purchaser, who is not coded and paying sales tax, is a sale at retail within the meaning of the statute. (We use the phrase "not coded and paying sales tax," employed by you, to mean that the purchaser does not have an account number assigned by your department and does not make returns to your department of tax collected by him on retail sales.) Of course, the statute does not create a non-rebuttable presumption that such a transaction is a sale at retail, and the seller may show that, as a matter of fact, the sale was not a retail sale within the meaning of the act.

As for your second question, insofar as the transaction in question is not exempt under Section 11409, R. S. Missouri, 1939, (re-enacted Sixty-fifth General Assembly, House Bill No. 303) which exempts sales made in commerce between this state and any other state, the burden of proof of showing that the sale was not a sale at retail would be upon the seller. However, the exemption of sales in commerce would also be involved in such transactions. Where the purchaser accepted delivery of the goods in Missouri, and then transported them to another state, the sale would be subject to tax, if not actually shown to be a sale for resale. If, however, the goods are shipped by the seller to the purchaser in another state, we feel that under the case of American Bridge Company v. Smith, 352 Mo. 616, 179 S.W. (2d) 12, the transaction would be exempt under Section 11409, and the question of whether or not the sale was actually a sale at retail would be immaterial.

Mr. W. H. Burke

CONCLUSION

Therefore, it is the opinion of this department that sales by a wholesaler to a purchaser, who is not coded and paying sales tax, may be considered a sale at retail within the meaning of the sales tax act, and that the burden is upon the seller in such transaction to show that the sale was actually not a retail sale within the meaning of the act. The same rule may be applied insofar as sales to purchasers outside the state are involved, except where sales are exempt under Section 11409 because made in commerce between this state and any other state.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW/feh

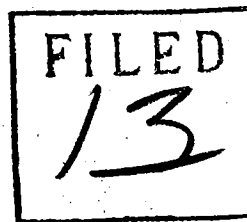
TAXATION SALE:

SALES TAX:

Sale by Missouri dealer to Missouri purchaser, of property shipped to dealer from foreign manufacturer for delivery to purchaser subject to Sales Tax.

April 11, 1950

Mr. W. H. Burke,
Assistant Supervisor,
Department of Revenue,
Division of Collection,
Jefferson City, Missouri.



Dear Mr. Burke:

We have your recent request for an opinion from this office. Your letter is as follows:

"The E. A. Martin Company at Joplin, Missouri are dealers in farm and other machinery. They have had quite a few cases which we have set up an assessment against them in which an order was placed with Martin and Company for a tractor or other machinery which is not carried in stock. The order is sent, for example, to the Caterpillar Tractor Company at Peoria, Illinois for shipment direct to Martin's customer, Mr. William Jones, at Neosho, Missouri.

"On account of the amount of money involved the shipment is billed to the order of the Caterpillar Company for William Jones, c/o E. A. Martin and Company at Neosho, Missouri. The original bill of lading is sent to Martin and Company who send their representative to Neosho and he presents the bill of lading to the railroad agent, pays the freight, and unloads the tractor, inspects it, and operates it to see that everything is in perfect condition and it is then ready to be turned over to Mr. Jones. At this time the finance man (in case these arrangements have not been made before hand) arranges with Mr. Jones for either full payment or time-payment on the machinery and then the machinery is turned over to Mr.

Mr. W. H. Burke:

April 11, 1950

Jones who takes it on to his place of operation.

"The E. A. Martin Company claim that these are interstate commerce transactions and would like to have your confirmation or disapproval of their contention."

Laws of 1947, Vol. 1, page 547 provides in part as follows:

"Amount of tax. - - From and after the effective date of this Act, there shall be and is hereby levied and imposed and shall be collected and paid:

"(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2%) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange." (Underscoring ours)

We also have in this state what is commonly known as exemption statute, Laws of 1945, page 1865, Section 1; Laws 1949, page _____, House Bill No. 303 Section 1, which exempts certain transactions in interstate commerce. It is clear, however, that if the instant transaction is intrastate in character, the above exemption statute would have no application here.

An examination of the facts set out in your letter indicates that the transaction with which we are here concerned is in intra, rather than interstate commerce.

In the recent case of Brosious v. Pepsi-Cola Co. 155 F. (2d) 99 the court stated as follows, l.c. 103:

"* * * When a substance is transported from one state into another, the interstate movement ends with the delivery of that substance to a distributing company. Subsequent sales and deliveries to customers of such company constitute intrastate commerce. East Ohio Gas Co. v. Tax Comm., 1931, 283 U.S. 465, 471, 51 S. Ct. 499, 75 L. Ed. 1171; State v. Bartles Oil Co., 1916, 132 Minn. 138, 155 N.W. 1035, L.R.A. 1916D, 193. Also, see 'original package'

Mr. W. H. Burke:

April 11, 1950

cases, *People ex rel. Burke v. Wells*, 1908, 208 U.S. 14, 28 S.Ct. 193, 52 L. Ed. 370; *State v. C.C. Taft Co.*, 1920, 183 Iowa 548, 167 N.W. 467, 9 A.L.R. 390, writ of error dismissed in 252 U.S. 569, 40 S. Ct. 345, 64 L. Ed. 720; *Baltimore & O. R. Co. v. United States*, D.C.N.Y., 1936, 15 F. Supp. 674. See Rottschaffer on Constitutional Law p. 321."

and it has been held as follows:

"The question whether commerce is 'inter-state' or 'intrastate' must be determined by the essential character of the commerce, and not by mere billing or forms of contract. *Gerdert v. Certified Poultry & Egg Co.*, D.C. Fla., 38 F. Supp. 964, 972.

"A movement of freight from the point of origin to the place of ultimate destination may be so interrupted that from the point of interruption a new and local service is obtained and transportation from point of interruption would be 'intrastate commerce.' *Sherman v. Southern Pac. Co.*, 93 P. 2d 812, 817, 34 Cal. App. 2d 490."

It is apparent that the instant situation is governed by the cases above cited, but added weight is given to this by the facts you recite. You state that the Martin Co. representative presents the bill of lading and takes possession of the tractor. It is manifest that this agent is acting for the Martin Co., and not for the ultimate purchaser. That the tractor has come to rest, in this state, while under the control of the Martin Co. is equally certain, and therefore it appears that the delivery of the tractor to the ultimate purchaser is a transaction in intrastate commerce, and therefore not within the exemption statute, *supra*.

That the sale itself is between the dealer, the Martin Co., and the purchaser is made explicit by your letter. Obviously the only purpose in marking the bill of lading "William Jones, c/o E.A. Martin & Co." is for the purpose of identification, that is, to insure that the purchaser "Jones" gets the kind and size of tractor he ordered. The statement of facts does not reveal any other connection between the purchaser and the manufacturer. The purchase, or "sale," then, is made in this state and therefore clearly falls within the provisions of

Mr. W. H. Burke:

April 11, 1950.

Section 1, page 547, Vol. 1, Laws 1947, set out in part,
supra.

CONCLUSION

It is, therefore, the opinion of this office that a sale transaction between a Missouri dealer and a Missouri purchaser, in which the subject matter of the sale is shipped by a foreign manufacturer to said dealer, who in turn delivers same to purchaser, is an intrastate sale and therefore not exempt from the Missouri Sales Tax, even though the shipment is marked for the ultimate purchaser in care of said dealer.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
Attorney General.

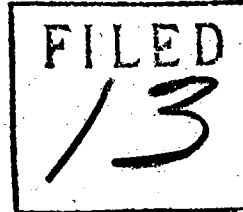
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TAXATION - SALES:
SALES TAX:

Persons engaged in business who do not have resale certificates with respect to certain transactions may offer evidence that such sales were not sales at retail.

April 11, 1950

Honorable W. H. Burke
Assistant Supervisor
Department of Revenue
Division of Collection
Jefferson City, Missouri



Dear Mr. Burke:

This department is in receipt of your recent request for an official opinion. Your request reads in part:

"We have an assessment against the Joplin Block and Material Company where their attorney claims that our rules and regulations are not a part of the Missouri Sales Tax Law and particularly objects to the rule stating that they must have resale certificates where they claim that a sale is for resale.

"The attorney states that if the customer advises them that the merchandise is purchased for resale that their client's liability ceases and that if we want to collect sales tax we must go to the purchaser and arrange to get the tax from him. The attorney further states that if they have nothing to show that the transaction was sale for resale at the time an audit is made, that it is only necessary for them to get a statement or a certificate from the purchaser and that it will then be incumbent upon us to exempt this sale from the taxable sales of his client."

As we interpret your opinion request, an audit has been made on a particular person doing business and subject to the Sales Tax Act, and that said person had no resale certificates with respect to certain transactions claimed to be sales for resale. The question

Hon. W. H. Burke

presented is whether or not statements or certificates now obtained from the purchasers will be sufficient to relieve the taxpayer from liability with respect to these transactions.

Section 11421, Laws Missouri 1945, page 1873, provides:

"Every person engaged in the businesses herein described in this State shall keep records and books of his gross daily sales, together with invoices, bills of lading, sales records, copies of bills of sale and other pertinent papers and documents. Such books and records and other papers and documents shall, at all times during business hours of the day, be subject to inspection by the Director of Revenue or his duly authorized agents and employees. Such books and records shall be preserved for a period of at least two (2) years, unless the Director of Revenue, in writing, authorized their destruction or disposal at an earlier date."

(Underscoring ours.)

Section 11413, Laws Missouri 1947, Volume I, page 554, reads in part:

"For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the Director of Revenue shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article. * * *"

Pursuant to the authority given the Director of Revenue by Section 11413, Article J of the General Interpretations of Law has been made and promulgated, which article reads in part:

"Section 11416 of the Sales Tax Act, relative to collection and remittance of the tax, requires that you include in your return any and all monies collected from the purchaser as sales tax.

"All sellers making taxable sales of tangible personal property or services, as defined by the Act, must determine when sales are made whether the buyer purchases such goods or services for use or consumption or for resale. (See Section 11420.)

"All sellers are required to keep ample records of sales and taxable transactions to support reports filed with the Director of Revenue. The Director of Revenue will

Hon. W. H. Burke

not recognize any deductions of any nature on your tax return unless you have ample supporting evidence in your records to explain your deductions. Therefore, all sellers must obtain and keep in their records signed resale certificates supporting deductions taken as sales for resale. Such certificates are to be kept in your files and must be made available for inspection by the Director of Revenue, or his agents, during all business hours of the day. These certificates of resale shall be only prima facie evidence that the property or taxable services described therein was sold for the purpose of resale, and the Director of Revenue has the right to examine all facts relative to the purchase and sale before said certificates will be honored."

(Underscoring ours.)

Therefore, to more efficiently administer the Sales Tax Act and to aid in the collection thereof, it is required that persons engaged in business keep among their records signed certificates of resale where the sales are such. These are required to support the deductions taken as sales for resale and they constitute prima facie evidence in the sellers' records explaining the deductions.

If the regulation requiring the keeping of such retail certificates is a reasonable regulation and in conformity with the Act, it is valid and binding upon the parties subject to the Act, as the Director of Revenue is specifically given the authority to make such regulation. It is our opinion that it is a reasonable regulation to require persons engaged in business to keep among their records, papers and memoranda required by Section 11421, supra, certificates of resale to support the deductions claimed by said persons in their reports to the Director of Revenue. This regulation will more efficiently secure the payment of an accounting for the tax. We are also of the opinion that said regulation conforms to the Act and is a reasonable exercise of the rule-making power afforded the Director of Revenue, as Section 11420, Laws Missouri, 1947, Volume II, page 435, places the burden of proving that a sale is not a sale at retail is upon the person making the sale. Section 11420 reads in part:

"The burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail, shall be upon the person who made the sale, except with respect to sales, services, or transactions provided for in subsection (b) of Section 11412.* * *"

Hon. W. H. Burke

However, the particular transactions with which we are here concerned were not sales at retail subject to the tax. The fact resale certificates were not obtained at the time of the transactions and were not on file at the time of the audit cannot change the legal nature of these transactions and make them subject to the tax. The Sales Tax Act provides that only sales at retail shall be taxed, and the Director of Revenue cannot by rule or regulation extend liability to sales which are for resale. It was held in the case of *Washington Printing & Binding Co. v. State*, 73 P. (2d) 1326, 1.c. 1328, 192 Wash. 448, that :

"The Tax Commission cannot, by such rule, impose a tax upon property or a transaction that is not mentioned in the statute as taxable. The rule making power is given only for the purpose of empowering the commission to carry out the provisions of the statute.

"The power vested in the commission to prescribe rules and regulations for making returns for ascertaining assessment and collection of the tax imposed by the act does not vest in the commission any discretion whatsoever in the matter of requiring the payment of a sales tax by any other than such as are designated in the act. It is true that an administrative body within prescribed limits, and when authorized by the lawmaking power, may make rules and regulations calculated to carry into effect the expressed legislative intention.' *Western Leather & Finding Co. v. State Tax Commission of Utah*, 87, Utah 227, 48 P. 2d 526, 527."

However, Section 11420, supra, does place the burden of proving that the sales in question were not sales at retail upon the seller. Failure to have resale certificates among the records required to be kept by a person engaged in business may constitute prima facie evidence that such sales were subject to the tax, but upon a hearing or an investigation by the Director of Revenue, evidence may be offered by the seller that such transactions were not sales at retail. Statements or certificates from purchasers in such transactions would constitute such evidence. Should proof be made that such sales were for resale, they are then not subject to the tax.

CONCLUSION

It is therefore the opinion of this department that the Department of Revenue may, by regulation, require persons engaged in business under the Sales Tax Act to obtain signed certificates

Hon. W. H. Burke

for resale when sales for resale are made. However, failure to have such resale certificates on file can impose no liability for such sales, but can merely constitute prima facie evidence that such sales were sales at retail. Evidence that such sales were for resale may be offered by such persons, and statements or certificates from the purchasers in these transactions would be such evidence. However, the burden of proof that such sales were for resale, and not subject to tax, lies with the persons who allege such.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



RHV:hr

TAXATION - SALES:
SALES TAX:

Failure to obtain resale certificates upon sales to peddlers creates no absolute liability for sales tax; failure to have such certificates merely constitutes prima facie evidence that such are retail sales.

April 24, 1950



Honorable W. H. Burke
Assistant Supervisor
Department of Revenue
Division of Collection
Jefferson City, Missouri

Dear Mr. Burke:

This department is in receipt of your recent request for an official opinion. Your request reads as follows:

"In St. Louis we have certain concerns who hire or use peddlers for disposing of their merchandise. These peddlers have no place of business and will work for a short time and be removed and new peddlers will take their place in various territories.

"The merchant claims he does not hire these people as they are only paid a commission on their sales, and he further claims that they buy the merchandise for resale and, therefore, he should not collect the sales tax.

"The merchant furnishes the peddler a certain amount of merchandise each morning for which he pays cash, but any unsold merchandise can be turned back to the merchant and the peddler will get his money back.

"Please advise if we should hold him liable for the sales tax on sales to peddlers as described above."

We have here the question of whether or not concerns who utilize peddlers to dispose of their merchandise should be held liable for sales tax on the sales of merchandise to such peddlers.

Honorable W. H. Burke

Should the peddlers in these instances be agents or employees of concerns in question, their sales would then be the sales of the concerns and the concerns would be subject to the sales tax. Though the facts recited in your opinion request regarding the relationship between the concerns and the peddlers are not too complete, we feel that they are sufficient to justify the views that the peddlers in these instances do not have the legal status of employees. In the case of *Garcia v. Vix Ice Cream Co.*, (Mo.App.) 147 S.W. (2d) 141, the status of a public vendor of ice cream eclairs and other frozen novelties was in question; the court held at l.c. 143, that:

"Accepting claimant's version of the facts in this case, it is made clear that the Vix Ice Cream Company neither had nor exercised any control over his sales of ice cream. Claimant set his own hours for work; he chose his own territory except he was told not to go in the other fellows' territory; he himself chose the amount of ice cream he thought he could sell; and each day he quit work when he desired and returned and paid for what he had sold at the rate of 65% of what he had received from sales.

"If under such an arrangement he was an employee, then so would the poor peddler of shoe laces and chewing gum be an employee of the merchant from whom he procures his wares at wholesale prices; and so would the newsboy be an employee of the publisher.

"This man's relationship with the Vix Ice Cream Company is comparable with the relationship of a newsboy to the publisher, and it is held that a newsboy is not an employee. In the case of *Hartford Accident & Indemnity Co. v. Industrial Accident Commission*, 123 Cal.App. 151, 10 P.2d 1035, the newspaper engaged the boy as a newsboy to sell their papers and had the right to discharge him in the event it so desired and the boy did not have the right to return unsold papers at the end of the day but was required to pay for them; he worked or not at will; the engagement was for no fixed time. The court held the boy was not an employee but an independent contractor.

"In the case of Bernat v. Star-Chronicle Pub. Co., Mo.App., 84 S.W.2d 429 was a 'newsboy' case in which the boy after purchasing a route from another entered into contract with the publishers whereby the papers would be sent to him daily by railway train, and the boy would meet the train and receive the papers and proceed to distribute copies of his regular customers and to sell extra copies to such purchasers as he might obtain; his contracts were for a definite time; he agreed to devote his earnest endeavor to the creation and establishment of a regular sale and demand for the papers; and prior to giving up the business to give the Company notice and to endeavor to secure a successor; and to pay all bills at a stated time at the regular prevailing wholesale rate, and to charge for the papers the regular rate established by the Company; he was required to keep a list of subscribers, the list to be the property of the Company; the Company reserved the right to sell papers to others, and the right to annul the agreement, without notice should any of its conditions be violated. This Court held the boy was not an employee."

We believe that under the language of Gracia v. Vix Ice Cream Company, the peddlers under consideration cannot be considered employees of the concerns whose merchandise they dispose of. It is true that this case involved the Workmen's Compensation Laws, but the definition of an employee under these laws has a broad meaning. It was so held in Bernat v. Star-Chronicle Pub. Co., (Mo.App.) 84 S.W.(2d) 429, l.c. 432:

"Undoubtedly the form of definition employed indicates a legislative intent that in cases arising under the act the term 'employee' shall be given a broad meaning (Pruitt v. Harker, 328 Mo. 1200, 43 S.W.(2d) 769), and yet it does not appear that the term was intended to include persons as to whom the accepted and recognized characteristics of service or employment were lacking. So we conclude that even though an 'employee' under the act is not in all events to be restricted to one serving under a contract of hire, express or implied (Pruitt v. Harker, supra), yet the fundamental conception of the relationship of employer and employee has not been altered in the enactment of the new legislation, and in all

Honorable W. H. Burke

essential respects the creation and existence of the relation under the act must still depend upon the same considerations as have been held to govern under the rules of master and servant law generally."

Therefore, for the purposes of this opinion, we shall consider the peddlers under discussion to be independent contractors, assuming that the additional facts regarding their relationship with the concerns are not such as would warrant classifying them as employees.

Section 11408(a), Laws Missouri 1947, Volume I, page 547, provides for a sales tax "upon every retail sale in this State of tangible personal property." Section 11407(g), Laws Missouri 1947, Volume I, page 535, defines a sale at retail as any transfer of "tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." The sales by the concerns in these instances to the peddlers as independent contractors, who in turn sell same to consumers, are undoubtedly sales for resale and not subject to sales tax.

However, Section 11413, Laws Missouri 1947, Volume I, page 554, provides in part:

"For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the Director of Revenue shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article. * * *"

Section 11420, Laws Missouri 1947, Volume II, page 435, provides in part:

"The burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail, shall be upon the person who made the sale, except with respect to sales, services, or transactions provided for in subsection (b) of Section 11412. * * *"

Pursuant to the authority of Section 11413 to make rules and regulations, Rule No. 32 of the Rules and Regulations relating to the Missouri Sales Tax Act has been made and promulgated, which Rule 32 reads in part:

"When tangible personal property is purchased by hawkers, peddlers and street vendors who do

Honorable W. H. Burke

not have regular established places of business, the person making said sales should obtain from said persons resale certificates, having the howker, peddler or vendor place thereon the code number under which he is paying sales tax to the State of Missouri. If such hawker, peddler or street vendor does not have a code number and is not collecting and remitting tax to the State of Missouri, he should pay the sales tax on the purchase of the merchandise which he intends to sell. Sellers of merchandise to such persons will be held strictly accountable for the sales tax on all sales for resale claimed by him unless he obtains and keeps in his files signed resale certificates as above outlined."

As held in an official opinion of this department addressed to you under date of January 13, 1950, "sales by a wholesaler to a purchaser, who is not coded and paying sales tax, may be considered sales at retail within the meaning of the sales tax act, and that sale was actually not a retail sale within the meaning of the act." Therefore, failure of the concerns to have resale certificates signed by the peddlers may constitute prima facie evidence of liability for sales tax, but the concerns, who have the burden of proving such, may prove that the sales were for resale.

An administrative agency has only authority to make rules and regulations to carry out the statutory provisions which are to be administered. Any regulation promulgated by an agency must be in conformity with the statutes, and not contrary thereto. It was so held in *Washington Printing & Binding Co. v. State*, 73 P (2d) 1326, 1.c. 1328, 192 Wash. 448, that:

"The Tax Commission cannot, by such rule, impose a tax upon property or a transaction that is not mentioned in the statute as taxable. The rule making power is given only for the purpose of empowering the commission to carry out the provisions of the statutes.

"The power vested in the commission to prescribe rules and regulations for making returns for ascertaining assessment and collection of the tax imposed by the act does not vest in the commission any discretion whatsoever in the matter of requiring the payment of a sales tax by any other

Honorable W. H. Burke

than such as are designated in the act. It is true that an administrative body within prescribed limits, and when authorized by the lawmaking power, may make rules and regulations calculated to carry into effect the expressed legislative intention.' Western Leather & Finding Co. v. State Tax Commission of Utah, 87 Utah 227, 48 P. 2d 526, 527."

Regarding sales to peddlers, Rule 32, supra, provides that "sellers of merchandise to such persons will be held strictly accountable for the sales tax on all sales for resale claimed by him unless he obtains and keeps in his files signed resale certificates as above outlined." This rule cannot be construed as making absolute the liability of such concerns as here considered for sales tax when resale certificates are not obtained from the peddlers. Such construction would constitute an imposition of liability where none lies under the act, as it would in effect be imposing liability upon sales which were for resale. Failure to have in possession such resale certificates can only constitute prima facie evidence of liability and the concerns in question may overcome same by proof that such sales were sales for resale.

CONCLUSION

In the premises, it is the opinion of this department that concerns who sell merchandise to peddlers for resale and who fail to obtain resale certificates from them cannot be held absolutely liable for sales tax. Failure to obtain such certificates can only constitute prima facie evidence that such sales were retail sales under the act. However, these concerns may prove that such sales were for resale, and upon a showing of such, there can be no liability for sales tax.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

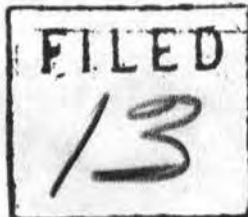
SALES TAX:
TAXATION - SALES:

Sales by Missouri buyers to Missouri sellers, goods shipped from without the State, are intrastate sales and not exempt from the Missouri Sales Tax Act.

June 12, 1950

*Mimeo copies
available
6/20/50 7-12-65*

Honorable W. H. Burke
Assistant Supervisor
Division of Collection
Department of Revenue
Jefferson City, Missouri



Dear Mr. Burke:

This department is in receipt of your recent request for an official opinion. Your opinion request is as follows:

"An amendment to interstate commerce regulation was issued by Mr. Bates under date of the 22nd of November, 1944 after decision in the cases of the American Bridge Company vs. Forrest Smith and the Binkley Coal Company vs. Forrest Smith, one paragraph which reads as follows: "Retail sales transactions involving delivery f.o.b. destination, in which the merchandise sold moves in interstate commerce, and in which the title and ownership to such merchandise pass to the purchaser while it is moving in commerce, or immediately after the movement in commerce has ended, are not subject to the provisions of the Missouri Sales Tax Act." Some of the fieldmen would like to have this clarification by statement from you.

"In case the sale is made from one Missouri seller to a Missouri customer and the merchandise is shipped direct to the customer from without the state, my contention is that the above paragraph does not apply. But, they have several cases where the taxpayer quotes this paragraph and claims no sales tax is due, and your decision on this matter has been requested."

Hon. W. H. Burke

Section 11408(a), Laws Missouri 1947, Volume I, page 535, levies and imposes "upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged." Section 11409, the Exemption Section, which has recently been reenacted as H. B. No. 303 by the 65th General Assembly, reads in part as follows:

"There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this State. * * * * *

Section 11409 has been construed by the Supreme Court of Missouri in the case of American Bridge Co. v. Smith, 179 S. W. (2d) 12, 352 Mo. 616, 157 A.L.R. 798, to exempt not only such retail sales as infringe the interstate commerce clause of the Constitution of the United States, but also all sales at retail in the sales transactions in interstate commerce. The court held at l. c. 17 that:

"The failure of the legislature to enact a general compensating use tax, and the failure of the legislature to amend by expressly restricting the exemption section to exempt only retail sales in interstate commerce which infringe the Commerce Clause, lend support to our conclusion that the legislature intended that the section should exempt all sales at retail in the sales transactions of interstate commerce."

The question, therefore, is whether or not sales by Missouri sellers to Missouri buyers, in which the merchandise is shipped by the sellers to the Missouri buyers from without the State, constitute sales in interstate commerce which would exempt such from the Missouri Sales Tax.

Hon. W. H. Burke

In the case of Graybar Electric Co. V. Curry, 189 So. 186, 238 Ala. 116, sales were made by an Alabama seller to an Alabama buyer with the subjects of the sales being shipped directly to the buyer from without the State. The court held that if the sales were in interstate commerce, the license tax attempted to be imposed thereon would be illegal and void. We find the following at l. c. 190:

"As to the sales included in Classes "B", "C" and "D", the evidence shows that the complainant was in fact and truth the seller; that its place of business was in Birmingham, Alabama; that it was at this place the complainant accepted the purchasers' orders for the goods; that the purchasers and ultimate consumers were residents of Alabama; that the goods contracted to be bought of the complainant were to be delivered to them in Alabama; and that the goods were paid for by the consumers to the complainant in Alabama. The sales were Alabama sales. The means by which, and the place from which, the complainant obtained the goods to fulfill its contract were but incidents in the transaction, and cannot serve to change the status of transactions. The consumers had no dealings with the nonresident manufacturers. Their contracts were with the complainant in Alabama for the sale and delivery of the goods to them in Alabama. Their contracts with the complainant were valid, enforceable contracts. Baker v. Lehman, Weil & Co., 186 Ala. 493, 65 So. 321. The tax assessed against the complainant as for sales included in Classes "B", "C" and "D" were properly made. The complainant is liable for said taxes. National Linden Service Corporation v. State Tax Commission, supra.

"Under the agreed facts relating to the sales described in Class "A", is the complainant liable for the payment of the tax of two per cent assessed by the state taxing authorities? These sales amount in the aggregate to \$32,689.11, and the tax thereon is \$653.78, if such sales were in fact taxable under the Alabama Sales Tax Law.

"These goods were ordered by the customers in Alabama, from the complainant in Alabama, for consumption here. In the orders the cost price of the goods which the customers were to pay was stated and fixed, and agreed on, in each order. These orders were accepted by the complainant in

Alabama, and carried with them the agreement that the goods were to be delivered to the purchasers in Alabama. It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case.

"It is not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause.' Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, Attorney General, 280 U.S. 390-396, 50 S. Ct. 169, 170, 74 L. Ed. 504; Browning v. Waycross, 233 U.S. 16, 23, 34 S.Ct. 578, 58 L. Ed. 828-832.

"The facts of the case must determine whether it falls within the protection of the commerce clause of the Federal constitution, and not the words of the contract. The desire to make its act an act in commerce among the states is unimportant, when the facts show it to be otherwise, Superior Oil Co. v. State of Mississippi ex rel. Rush H. Knox, Attorney General, Supra."

In Commissioner of Corporations and T. v. Ford Motor Co., 33 N. E. 2d 318, 308 Mass. 558, the court held at l. c. 324:

"The board found that the fifth item of the schedule of sales 'embraced sales to dealers located in Massachusetts within the territory of the Somerville branch, but filled by branches outside the State' and that these were 'interstate sales.' Read with the other findings of the board concerning the character of the other groups of sales comprised in the said schedule,

we interpret the finding as to the sales included in this fifth item to be one that the goods were ordered at the Somerville branch of the company by its dealer customers located within its territory in this Commonwealth and that the goods were delivered to them by branches of the seller located without the Commonwealth. We do not concur in the view of the board that these were 'interstate sales,' similar to those where sales are made by a company having an office here which is used as headquarters for salesmen who solicit orders in this Commonwealth and in other New England States. We are of opinion that these sales were intrastate sales made by the taxpayer at its Somerville branch (where it also assembles and sells automobiles and sells parts) to its customers located in this Commonwealth and within the territory of that branch and that the character of these sales was not affected by the fact that the company caused delivery of the automobiles to be made to such customers by its branches situated outside the Commonwealth. *Graybar Electric Co. v. Curry*, 238 Ala. 116, 189 So. 186, affirmed, 308 U.S. 513, 60 S. Ct. 139, 84 L. Ed. 437. * * * * *

Again in *Hollis & Co. v. McCarroll*, 140 S.W. (2d) 420, 200 Ark. 523, the question was whether or not the Arkansas retail sales tax law applied to sales by an Arkansas seller to an Arkansas buyer where the shipments were from without the state directly to the buyer. The court held that such sales were not transactions in interstate commerce and states as follows at l. c. 423:

"Nor (in view of decisions of the Supreme Court of the United States) do we think the sales made by appellant were transactions in interstate commerce. *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Company*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. ---; *McGoldrick, etc. v. A. H. DuGrenier, Inc.*, 309 U.S. 70, 60 S.Ct. 404, 84 L.Ed. ---. * * * * *

"That appellant in the case before us did not carry certain articles of merchandise or machinery in stock and ordered from distributors or manufacturers in other states, with directions that shipments be made to its customers, does not

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relieve the transactions of their essential intrastate characteristics. The contracts of purchase were made in this state. In each case appellant's undertaking was to supply the merchandise and the customer's obligation was to pay appellant. The transaction was consummated in Arkansas. The point from which shipment was made was merely incidental, and of no concern to appellant's customer. The customer was not obligated to the nonresident shipper. Appellant profited to the extent of the difference between the price charged it and the price it in turn charged the customer."

In view of the above authorities it must be concluded that such sales as here under consideration are intrastate sales in the State of Missouri, and are not transactions in interstate commerce. Any interstate shipments which might occur are merely incidental to the transactions, the intrastate characteristic of the transactions not being affected. The Missouri sales here in question must therefore be considered intrastate transactions which are subject to the Missouri Sales Tax.

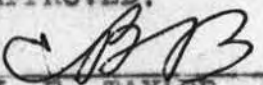
CONCLUSION

It is, therefore, the opinion of this department that sales by Missouri sellers to Missouri buyers in which the merchandise is shipped directly to the buyers from without the State are intrastate sales and not exempt from the Missouri Sales Tax Act.

Respectfully submitted

RICHARD H. VOSS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
ATTORNEY GENERAL

ELECTIONS

) Voter may vote only on charter proposition when
) submitted at primary election, *not required*
to vote political ballot.

July 17, 1950

7-17-50



Honorable Paul C. Calcaterra
Chairman, Board of
Election Commissioners
For the City of St. Louis
208 South Twelfth Boulevard
St. Louis 2, Missouri

Dear Sir:

We have received your request for an opinion of this
department, which request is as follows:

"The City of St. Louis is holding
its Charter Election on the same
day as the Primary, August 1, 1950.
The question has arisen as to whether
the voter may cast a ballot for the
Charter Election only, or must he
also vote at the Primary Election
wherein he must state his choice of
party ticket.

"Please let us have your opinion as
soon as possible."

We find no statutory provision or decision of any court
in this state which in any way would require that a person
who wishes to vote on the proposed new charter for the
City of St. Louis, which is to be submitted at the primary
election in St. Louis on August 1st, also participate and
cast a ballot in the primary election.

The only reported case which we find which might be
taken to indicate that a person must cast his ballot on all

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proposals submitted at the same election is the case of *Dysart v. City of St. Louis*, 11 S.W. (2d) 1045. In that case the court was passing upon the question of whether or not a bond issue proposal which was submitted at a regular primary election was a special election within the meaning of a provision requiring a special revision of registration prior to any special election. The court in that case stated at 11 S.W. (2d), l.c. 1052:

"The theory that a proposition, other than the election of officers, submitted on the day of a general election, is a 'special election' leads to absurd results. Some propositions or amendments are submitted by referendum, some by initiative, some by proclamations of the Governor, etc. If each were a special election we might have a dozen elections on the same day, administered by the same judges, and the voter would vote in a dozen elections, in several of them possibly on a single ballot, and the vote on all of them deposited at one and the same time.

(Emphasis ours.)

* * * * *

" * * * A proposition to issue bonds may be submitted at a regular primary election, and such submission does not constitute it a special election.

"It is a matter of common knowledge that at nearly every general election propositions are authorized and submitted to the voters as special propositions. Submissions of these special propositions are not, in common parlance, called special elections. They are merely votes on special propositions submitted at a general election."

While this language might be taken to indicate that the submission of several proposals at the same time constitutes but a single election, still there is nothing in that case to

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indicate that a voter is not entitled to choose the propositions upon which he will vote at the election and refuse to vote on others submitted at the same election.

Participation in elections in this state has always been a voluntary matter. The voter is free to vote or not as he chooses, and we see no reason why he should not be permitted to vote upon such proposition as he might see fit.


CONCLUSION

Therefore, it is the opinion of this department that a voter may cast a ballot for the charter election only, which is being held in the City of St. Louis at the same time as the regular primary on August 1, 1950, and he is not required to vote in the primary election.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh

COUNTY HOSPITALS:
LIABILITY OF COUNTY:

Neither the county nor the board of trustees of a county hospital are liable for the torts committed by its staff or employees, and are not liable for property damage or injuries received by reason of the negligent maintenance of the hospital building or the premises adjacent thereto.

April 10, 1950

FILED 15

Mr. John M. Cave
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Cave:



I.

You have requested an opinion from this department upon the following questions:

- "1. What is the liability of the individual members of the staff of the Callaway County Hospital for damages or injuries sustained by patients through negligence of the staff in the care of the patient, or by mistake in the administering of medicines or drugs by a registered nurse or other authorized person, practicing physicians excluded?
- "2. What is the liability of the County, either as the County per se or through the Board of Trustees, for such damages or injuries as mentioned above?
- "3. What is the liability of the County, either as the County per se or through the Board of Trustees, for damages or injuries sustained by members of the public, other than patients, as a result of the negligence in the maintenance of the premises of the County Hospital?
- "4. What is the liability of the individual members of the staff or of the Board of Trustees for damages or injuries mentioned in paragraph 3?

"This request for opinion is made on behalf of the Board of Trustees of the Callaway County Hospital."

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II.

In regard to the first question we wish to inform you that we are not permitted by Section 12899, R. S. Mo. 1939, to give advice to private individuals. We feel that the question of the liability of the individual members of the staff of the Callaway county hospital is a private matter because they are paid for their services, and any liability that they might have is not a problem concerning the Callaway county hospital.

Your second question is in regard to the liability of the county, either as the county per se or through the board of trustees for damages or injuries suffered by patients as a result of negligence on the part of the staff in the care of patients, or by mistakes in the administering of medicine or drugs by a registered nurse or other authorized person.

Your third question concerns the liability of the county, whether as the county per se or through the board of trustees for damages or injuries sustained by members of the public, other than patients, as a result of the negligence in the maintenance of the premises of the county hospital.

We will first consider the general liability of the county and the board of trustees of the Callaway county hospital, and then we will attempt to answer each of the specific questions.

The Constitution of Missouri of 1945, at Article IV, Sec. 37, provides as follows:

"The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

This makes the protection of the health of the people an essential governmental function. We believe that the maintenance and operation of the Callaway county hospital promotes the protection and betterment of public health.

"A county is not liable, in the absence of statute for torts committed by it in the exercise of its governmental functions, but it is liable for torts committed in a proprietary capacity or for a tortious

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appropriation of property." (20 C.J.S. page 1067, Sec. 215)

There is no statutory or constitutional provision in this state for imposing any liability upon a county for torts committed by it in the exercise of its governmental functions.

"In the absence of statute, a county is generally not liable for injuries arising from the condition or maintenance of public buildings, places or property. * * *" (20 C.J.S. page 1069, Sec. 217)

"The general rule, as to which courts have been said to be practically unanimous, is that in the absence of statute creating such liability, a county is not liable for the tortious acts or omissions of its officers, agents, servants, or employees; but this rule is not of universal application, and it is more particularly held that in the absence of statute a county is not liable for tortious acts of its officers, agents, or servants committed by them while engaged in a governmental capacity or in the discharge of a governmental function. The general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured, is not ordinarily applied to counties; and the rule as to nonliability holds good even though the officer or agent is acting under the direction of the county board or other county authority. These rules have been applied to suits against the county by prisoners and by patients in county hospitals. * * *" 20 C.J.S., page 1075.

"It is well settled that since counties are organized for public purposes and charged with the performance of duties as arms or branches of the state government, they are never to be held liable in a private action for neglect to perform such duties, for acts done while engaged in the performance of such duties, or because they are not performed in a manner most conducive to the safety of employees or the public, unless such liability

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is expressly fixed by statute. The fact that counties are declared by statute to be municipal corporations does not change the rule in the absence of anything in the statute imposing any additional liability. Moreover, no new liability for torts is imposed upon a county by a statute making it a municipal corporation for exercising the powers and discharging the duties of local government and administering public affairs, and providing that actions for damages for any injury to property or rights for which it is liable shall be in the name of the county. * * *"
(14 Am. Jur. 215, Sec. 48)

"The principal ground upon which it is held that counties are not liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for public purposes connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation or even the consent of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are in fact no less than public agencies of the state, invested by it with their particular powers, but with no power to decline the functions devolved upon them, and hence, are clothed with the same immunity from liability as the state itself. In other words, the rule of nonliability for torts is dictated by public policy. Since a suit against the county is in effect a suit against the state, an action will not lie without the consent of the legislature." (14 Am. Jur. Sec. 49, page 216.)

"It is a general rule that counties are not liable at common law for injuries resulting from the negligence of their officers or agents. It has been said that the powers and duties of counties bear such a close analogy to the governmental functions of the state at large that 'as well might the state be held responsible for the negligent acts of its officers as counties.' When duties are imposed upon a board of county

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commissioners by law rather than by the county, the latter will not be responsible for their breach of duty or for their nonfeasance or misfeasance in relation to such duty. Furthermore, where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim 'respondeat superior' does not govern. In some instances, however, the distinction between municipal corporations proper and counties has been disregarded and counties are held responsible for the negligent acts of their officers. * * * *"(Sec. 50, 14 Am. Jur. page 217.)

"In the absence of statutory provision to the contrary a hospital created and existing for purely governmental purposes and under the exclusive ownership and control of the state or a governmental subdivision is not liable for the negligence or misconduct of its employees, or for personal injuries sustained by an employee, although a statute may declare it to be a corporation which may sue and be sued. Likewise the state is not liable, and even if the statutes do permit a suit against the state therefor, no recovery can be had where there is no showing of negligence on the part of its officers or agents. * * *"(41 C.J.S. Sec. 8, page 341.)

In the case of Henderson v. Twin Falls county, Idaho, 50 P.(2d) 597, 101 A.L.R. 1151, the Supreme Court of Idaho considered a case where a paying patient in a county hospital sued to recover damages for personal injuries sustained in said hospital. A nurse in the county hospital injected boric acid into the sides and thighs of the patient instead of a saline solution prescribed by the physician. The court held that a county empowered by statute but not required to establish and operate a county hospital primarily for the care of indigent sick but to which paying patients may be admitted, is in so doing acting in a proprietary and corporate rather than a governmental capacity, so as to be liable to a paying patient for the negligence of hospital employees. The court said:

"The immunity of state governments for the negligence of their officers and employees also rests upon the early English common-law

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doctrine, as above stated, adopted in the United States, that the 'King can do no wrong.' And the immunity counties and cities likewise enjoy rests upon that doctrine. As to towns and cities, it is generally held that they possess a double character: The one governmental, legislative, or public; the other, in a sense, proprietary or private. 1 Dillon, Mun. Corp. (5th ed.) p. 181; Strickfaden v. Greencreek Highway Dist., 42 Idaho, 738, 248 p. 456, 458, 49 A.L.R. 1057. And in its capacity as a private corporation a municipality stands on the same footing as would an individual or body of persons upon whom a like special franchise had been conferred. Strickfaden v. Greencreek Highway Dist., supra. The advance of counties into fields of private enterprise did not commence as early and has not progressed as rapidly as that of the cities, so that the liability of a county for its torts in private enterprise has not become so well settled. However, it was somewhat recently held by the Supreme Court of Pennsylvania, in Bell et ux. v. City of Pittsburgh and Allegheny County, 297 Pa. 185, 146 A. 567, 64 A.L.R. 1542, that a county is liable for the negligence of its employees in operating an elevator in a city and county building, jointly owned, maintained, and operated by the county and the city of Pittsburgh, partly for business and partly for governmental purposes although the person injured was on the way to the office of a governmental department of the city, and that a county which engages in activities not of a governmental nature is liable for the torts of the employees therein. See, also, Cleveland v. Town of Lancaster et al., 239 App. Div. 263, 267 N.Y.S. 673."

* * * * *

"* * * it is well settled that, in the absence of an express statute to that effect, the state is not liable for damages either for nonperformance of its powers or for their improper exercise by those charged with their execution. Counties are generally likewise relieved from liability, for the same reason. They are involuntary subdivisions or arms of the state through which the state operates for convenience in the performance of its functions. In other words, the county is merely an agent of the state, and, since the state cannot be sued without

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its consent, neither may the agent be sued.'

* * * * *

We see from this case that the Supreme Court of Idaho found that the operation of a county hospital was not a required governmental function but was a voluntary proprietary function and thus held the county liable for a tort.

The only Missouri case that we have been able to find holding similar to the above Idaho case is the case of Hannon v. St. Louis County, 62 Mo. 313, in which it was held that the laying of a water pipe from the water mains of a nearby city to an insane asylum maintained by the defendant county, was a private function since the county could not have been compelled to lay the pipe and could have employed private contractors to do the same, and that the defendant was therefore held liable for the death of plaintiff's son because of the cave-in of the ditch dug for the laying of the pipe.

This case (Hannon v. County of St. Louis) was impliedly overruled in Swineford v. Franklin County, 72 Mo. 279, and was expressly disproved in the case of Moxley v. Pike County, 276 Mo. 449.

The Supreme Court of Missouri in Cochran v. Wilson, 287 Mo. 210, considered the liability of a school district for personal injuries received by the plaintiff and said at l.c. 219:

"The question as to the liability of quasi-corporations for the negligence of their directors, officers or employees has, in regard to other than school districts, been frequently considered by this court.
* * *"

The court then discussed numerous Missouri cases upon this question. The court in discussing said cases, said:

"* * * In Reardon v. St. Louis County, 36 Mo. 555, an action was brought by a widow against the county for the death of her husband alleged to have been caused by the negligence of the county in failing to keep a bridge in repair. A demurrer was sustained to the petition and upon appeal to this court the judgment was affirmed.

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"The basis for this ruling, briefly stated, is that counties are quasi-corporations created by law for purposes of public policy and are not answerable in damages for a failure to perform the duties enjoined on them unless the right of action is given by statute.

"In Swineford v. Franklin County, 72 Mo. 279, the plaintiff brought suit against the county for damages caused by the county court ordering the filling up of a mill race which crossed a public highway. By a divided court the plaintiff was held not entitled to recover, on the ground of the non-liability of the county as a quasi-public corporation in its control, through the county court, of the public highways.

* * * * *

"In Moxley v. Pike County, 276 Mo. 449, 1.c. 453, this court ruled that a county was not liable for an injury caused by a defective highway. The reasons for the court's ruling are stated somewhat elaborately and may not inappropriately be quoted in this connection.

"When, for convenience in the administration of its laws, the State, through the Legislature, calls to its aid those territorial organizations sometimes called, with more or less accuracy, quasi-corporations, such as counties, townships and school districts, the question has frequently arisen whether these agencies share, with the State itself, immunity from common-law liability for the negligence of their officers in the exercise of their territorial duties. The answer, from the courts of this State, has generally been a negative one. From Reardon v. St. Louis County, 36 Mo. 555, down to Lamar v. Bolivar Special Road District, 201 S.W. 890, are many cases which will be found collected in the case last cited which have settled the general principle so firmly that it is not questioned by this appellant. On the other hand, it has been equally well settled that municipal corporations, which include cities, towns and villages, are, in the control, management and maintenance of their streets, alleys and public places, subject to such liability. The cases

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recognizing this doctrine are so numerous and so constantly before our appellate courts and their doctrine so well recognized as to render citations not only unnecessary but unjustifiable. This general doctrine is also recognized and admitted by the parties to this appeal.'

* * * * *

"In *Nicholas v. Evangelical Hospital*, 281 Mo. 182, a patient sued the hospital for damages for burns inflicted from the negligence of a nurse. The court, in holding the hospital not liable, said: 'The law has been firmly established by the great weight of authority that the funds of a charitable hospital or association are trust funds devoted to the alleviation of human suffering and cannot be diverted or absorbed by claims arising from the negligence of the trustees or their employees in administering the trust or charity.' In thus ruling the court cited with approval two Courts of Appeals cases in which the exemption of hospitals from the rule of respondent superior was clearly set forth.

"In *Adams v. University Hospital*, 122 Mo. App. 675, suit against the hospital had been brought by a patient burned with hot-water bottles while under the influence of an anesthetic. The court held that the hospital, being a charitable institution, was not liable for the negligence of either its managers or its employees. ELLISON, J., at page 686, thus states the reason for this ruling: 'But it is manifest that if we uphold a rule which would make an institution of charity liable to a patient who has been injured by an incompetent servant, negligently selected, we destroy the principle we have endeavored to make plain, that charitable trust funds cannot be diverted from the purposes of the donor. For it can make no difference, so far as the integrity of the fund is concerned, whether it be sought after by one who is injured by the negligence of a servant, or the negligent selection of such servant.'

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"In Whittaker v. Hospital, 137 Mo. App. 116, an employee brought suit against the hospital for injuries. In denying liability Goode, J., at page 120, said: 'Two rules of law, both founded on motives of public policy, come into conflict here; the rule of respondent superior (or if not technically that, one akin to it) and the rule exempting charitable funds from executions for damages on account of the misconduct of trustees and servants. As both rules rest on the same foundation of public policy, the question is whether, on the facts in hand, the public interest will best be subserved by applying the doctrine of respondent superior to the charity, or the doctrine of immunity; and we decided this cause for respondent because, in our opinion, it will be more useful on the whole not to allow charitable funds to be diverted to pay damages in such a case; and, moreover, the weight of authority is in favor of this view, as expressed not only in cases where the parties, seeking damages were patients in the institution, but where they were not.'"

The Supreme Court of Missouri in the case of Todd v. Curators of Missouri University, 347 Mo. 460, 147 S.W.(2d) 1063, considered a suit to recover for personal injuries against the state university received by the plaintiff while making repairs to one of the buildings of the university. The court said:

"(1) There is no doubt that this defendant has the right to sue and is liable to be sued in some kinds of action. That right and that liability are expressly provided by statute and said defendant has frequently sued and been sued in the courts of this State. Appellant cites a number of such cases, but none of them discusses the liability of this corporation to be sued for negligence. The cases cited by appellant on this branch of the case, with two exceptions, fall under the following classes; mandamus, injunction, suits on contract or to construe wills. The two exceptions are: Niedermeyer v. Curators, 61 Mo. App. 654, and Babb v. Curators, 40 Mo. App. 173. The Niedermeyer case seems to have been a suit for money had and received to recover alleged excess in tuition fees paid under

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protest. The Babb case was a suit for damages for discharge of sewage on plaintiff's land. The only issues discussed or decided were in reference to evidence or instructions.

"The defendant, The Curators of the University of Missouri, is a public corporation.* * *"

* * * * *

"In the absence of express statutory provision, a public corporation or quasi corporation, performing governmental functions, is not liable in a suit for negligence. (Cochran v. Wilson, 287 Mo. 210, 229 S.W. 1050; Dick v. Board of Education (Mo.) 238 S.W. 1073; Krueger v. Board of Education, 310 Mo. 239, 274 S.W. 811, 40 A.L.R. 1086; Robinson v. Washtenaw, Circuit Judge, 228 Mich. 225, 199 N.W. 618; Reardon v. St. Louis County, 36 Mo. 555; Clark v. Adair County, 79 Mo. 536; Moxley v. Pike County, 276 Mo. 449, 208 S.W. 246; Lamar v. Bolivar Special Road District (Mo.), 201 S.W. 890; State ex rel. v. Allen, 298 Mo. 448, 250 S.W. 905; Zoll v. St. Louis County, 343 Mo. 1031, 124 S.W.(2d) 1168; Bush v. State Highway Commission, 329 Mo. 843, 46 S.W.(2d) 854; Broyles v. State Highway Commission (Mo. App.), 48 S.W.(2d) 78; Arnold v. Worth County Drainage District, 209 Mo. App. 220, 234 S.W. 349; D'Arcourt v. Little River Drainage District., 212 Mo. App. 610, 245 S.W. 394.)

"(3) A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. '* * * But the waiver by the State for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the State is quite another thing.' (Bush v Highway Commission, 329 Mo. 843, 1.c. 849, 46 S.W.(2d) 854. See also Hill- Behan Lumber Co. v. State Highway Commission 347 Mo. 671, 148 S.W.(2d) 499, and cases cited, supra.)

"(4) The cases heretofore cited are mainly based upon the principle that a public corporation,

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performing governmental functions, is an agency or arm of the State and entitled to the same immunity as the State itself, in the absence of express statutory provision to the contrary. Another reason for immunity of public educational institutions, not organized for profit, from suits for negligence rests upon the public policy which has existed in this State from its beginning. The funds of the State University, whether raised by taxation, endowments or tuition fees, are dedicated to the beneficent purpose of education. It has no funds, nor means of raising funds, for the purpose of paying damages for tort nor is its property subject to execution for such purpose. Courts should maintain such public policy unless and until it be changed by positive legislative enactment. (Cochran v. Wilson, 287 Mo. 210, l.c. 226, 227, 229 S.W. 1050; Dick v Board of Education (Mo.), 238 S.W. 1073; Meadow Park Land Co. v. School District, 301 Mo. 688, 257 S.W. 441, 31 A.L.R. 343; Nicholas v. Evangelical Deaconess Home, 281 Mo. 182, 219 S.W. 643.)"

The Supreme Court of Missouri considered the question of liability for negligence of the Y.W.C.A. in the case of Eads v. Y.W.C.A. 325 Mo. 577, 29 S.W.(2d) 701. The court considered in this case numerous cases decided by appellate courts in other states which held charitable associations exempt from liability for injuries caused by negligence of the Association or its servants to strangers as well as cases involving injury to patients or employees of the charitable association or hospital. The Supreme Court of this state said in this case, l.c. 589:

"* * *The courts of this state, upon careful consideration, have decided that it is better public policy to hold them exempt and have adopted what has sometimes been called the trust-fund doctrine, viz., that the funds of such institutions constitute a trust fund for the charitable purposes of the organization which may not be diverted to the payment of claims for damages for injuries due to negligence of managers, officers and servants of the institution, thereby depleting the fund. In a well considered opinion, in which numerous authorities are reviewed the Kansas

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City Court of Appeals, in Adams v. University Hospital, 122 Mo. App. 675, 99 S.W. 453, held that a charitable hospital association was not liable to a 'pay patient' who was injured through the negligence or incompetence of a nurse while being treated in the hospital, the court holding that the hospital was exempt from liability whether injury was due to negligence of a servant in whose selection due care had been used or to negligence of the managing authorities in selecting an incompetent servant; and holding further that the fact that the patient paid for the service and attention received made no difference, the payment being treated as in the nature of a contribution to the support of the institution.

* * * * *

"* * * *We are not persuaded that it would be the better public policy to abandon the doctrine heretofore followed in this State."

In regard to your third question, the question of the liability of the county hospital for damages or injuries sustained by members of the public, other than patients, as a result of the negligence in the maintenance of the premises occupied by the county hospital is also controlled by the question of whether or not the use of the premises and building is in the exercise of the governmental functions of the county. Since the maintenance of a county hospital is deemed to be a governmental function then a county would not be liable for injuries caused by defects due to negligence in the county hospital building or premises used in connection therewith or by the negligent operation of elevators in said building. See Pearson v. K. C. 331 Mo. 885, 55 S.W. (2d) 485, and the cases cited in said case on page 891 of the Mo. Rep.

The maintenance of a city hospital has been held the performance of a governmental function by municipality. The City of St. Louis, therefore, was held not liable to a charitable hospital patient for injuries resulting from the negligence of its servants and that institution in the case of Murtaug v. St. Louis, 44 Mo. 479.

In a more recent case the city of Kansas City was held not liable for the death of patient's husband killed by an insane patient in whose cell he was placed, in the case of Zummo v. Kansas City, 285 Mo. 222, 225 S.W. 934. We believe that the operation of a county hospital is for the preservation of public health and is therefore the performance of a proper governmental

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function.

In the Pearson case, supra, the court cited from 43 C.J. 1167, Sec. 1930, in regard to elevator accidents as follows:

"The maintenance and operation of an elevator in a court house, city hall or other building used for governmental purposes, is the exercise of a public, governmental function, and hence the municipality is not liable for injuries due to the negligent maintenance and operation of the elevator."

The court in the Pearson case does not decide the question of liability of a municipality for personal injuries caused from maintaining a nuisance upon city property used for governmental purposes. Your third question does not concern itself with the question of liability for the maintenance of a nuisance on the premises by the county hospital. The Pearson case, supra, discusses the general law in regard to the liability of a municipality for injuries caused by the maintenance of a nuisance on the city's property.

In 160 A.L.R. at page 70 the question of the liability of public schools for the creation or maintenance of a nuisance on school premises resulting in damages is considered. This annotation states that the immunity of municipal corporations from liability for acts done in the performance of governmental functions does not extend to cases of personal injuries resulting from a nuisance created or maintained by a municipality even though the nuisance was created or maintained in the course of the discharge of public duties or governmental functions, according to a majority of the courts.

The Supreme Court in the Pearson case, supra, said:

"A nuisance does not rest on the degree of care used, but on the degree of danger existing with the best of care. * * * *"
(Underscoring ours.)

Said court again in the Pearson case quoted from Schnitzer v. Excelsior Powder Mfg. Co. (Mo. App.) 160 S.W. 282, 1.c. 284, as follows:

"Nuisance and negligence are different kinds of torts, not only in legal classification but in their essential features. Negligence is not a necessary ingredient of the wrong of maintaining a nuisance,

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and, given the fact that a nuisance was maintained, the question of whether the wrongdoer was careful or negligent in the manner of its maintenance is wholly immaterial.'"

If you wish to have an opinion from this department on the question of liability of the county for the creation or maintenance of a nuisance in the county hospital building or upon the premises connected therewith, then you should make another request on this particular question.

In regard to your fourth question, we do not see how the individual members of the hospital staff could be involved with the maintenance of the premises of the county hospital, and the individual members of the board of trustees would not be liable for the reason stated above.

CONCLUSION

The county of Callaway and the board of trustees of the Callaway county hospital are engaged in the performance of a governmental function while maintaining and operating a county hospital, and the staff and employees of said hospital are not considered by the courts of Missouri to be agents of the county or the board of trustees of said hospital and therefore the doctrine of respondeat superior does not apply so that neither the county nor the board of trustees of said county hospital are liable for the torts committed by the staff or employees of said hospital.

The county of Callaway and the board of trustees of the Callaway county hospital are not liable for damages or injuries sustained by the public as a result of negligence in the maintenance of the hospital building or premises adjacent thereto.

Respectfully submitted,

APPROVED

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

REGISTRATION OF
VOTERS:

For the purpose of registration of voters,
the 1950 decennial census becomes effective
January 1, 1951.

June 20, 1950

6/21/50



Mr. John M. Cave
Prosecuting Attorney of
Callaway County
Courthouse
Fulton, Missouri

Dear Sir:

Your recent request for an official opinion has been assigned
to me to answer. You thus state your request:

"Enclosed you will find a copy of a letter
received by Mr. Frazier Baker, City Attorney
of Fulton, Missouri.

"The opinion of your office is hereby requested
on the following question:

"Is Article 19, R. S. of Missouri for
1939, as amended, now effective as to
the City of Fulton, and if not effective
now when does it become effective?

"Your prompt attention in this matter will be
greatly appreciated in view of the Statutory
requirements for registration and the approach
of the Primary election."

Senate Revision Bill No. 1001, of the 65th General Assembly of
Missouri, now effective, Section 1.10, states:

"The population of any political subdivision
of the state for the purpose of representation
or other matters including the ascertainment of

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the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1, of each tenth year after 1951."

From the above it will be seen that the effective date, in the State of Missouri, of the 1950 decennial census, is now January 1, 1951, for all purposes, inasmuch as the section quoted above contains the all-embracing phrase: "The population of any political subdivision of the state for the purpose of representation or other matters * * * shall be determined* * *." Certainly this would include and apply to the registration of voters in those municipalities where by statute registration is required when on the basis of the census the population reaches a certain point, if these municipalities are political subdivisions.

Article 19, R. S. Missouri 1939, has been largely amended by House Revision Bill No. 2052 of the 65th General Assembly of Missouri.

Section 114.01 of that bill states:

"In all cities of this state, whether organized under general law or special charter; which now or hereafter have a population of 10,000 and less than 30,000 inhabitants, except cities in counties where registration is now provided by law, there shall be a registration of all the qualified voters pursuant to the provisions of this chapter. The population of cities within the state shall for the purposes of this chapter be ascertained from and determined by the last federal decennial census."

We note from the letter attached to your opinion request that the City of Fulton, on the basis of a report from the district supervisor of the census of the district in which the City of Fulton is located, now has a population of over 10,000 and less than 30,000.

We must now determine whether the City of Fulton is a "political subdivision of the state" within the meaning of Section 1.10 of Senate

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Revision Bill No. 1001 quoted above.

In this connection we would direct your attention to the case of State v. Ferguson, 65 S. W. (2d) 97, where the Supreme Court of Missouri was interpreting the provisions of Section 13 of Article 14 of the Constitution of 1875, which section provided as follows:

"Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Said l. c. at page 99:

"Is a city of the third class a political subdivision? A standard work on municipal corporations so defines it in the following language: 'A municipal corporation, in its strict and proper sense is a body politic and corporate constituted by the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law as an agency of the State to assist in civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated.' Dillon (5th Ed.) vol. 1, Section 31.

"Section 47 of article 4 of the original Constitution, prohibiting the lending of credit, refers to counties, cities, towns, or townships as 'political corporations or subdivisions of the State.'

"We approve the following observations made in Kinney v. City of Astoria, 108 Or. 514, 528, 217 P. 840, 845: 'Pure municipal corporations, such

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as cities, are merely instrumentalities of the state, established for the convenient administration of local government; they are state governmental agencies; they are auxiliaries of the state for the purpose of self-government; they are mere political subdivisions of the state created by authority of the state for the purpose of exercising a part of its powers."

The framers of the Constitution of Missouri said concerning Article X of such constitution, in Section 15:

"Definition of 'Other political subdivision.' - The term 'other political subdivision' as used in this article, shall be construed to include townships, cities, towns, villages, schools, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

We would also direct your attention to an official opinion rendered by the Attorney General, dated August 9, 1946, to the Honorable G. H. Bates, State Collector of Revenue, the conclusion of which was:

"In the premises, we are of the opinion that the proper definition of the term 'other political subdivision' as found in subsection 10 of Section 39, Article III, of the Constitution of 1945, is that which is found as Section 15 of Article X of the Constitution of 1945, and that such term as so defined must be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts, and any other public subdivision, public corporation or public quasi-corporation having the power to tax. We, therefore, hold that the use, purchase or acquisition of property paid for out of the funds of any township, city, town, village, school, road, drainage, sewer or levee district, or of any other public subdivision, public corporation or public quasi-corporation having the power to tax, is not subject to a use or sales tax by the State."

We are aware of the holding by the Supreme Court of Missouri that a city is not a political subdivision of the State as such

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term is used in Section 3, Article V, of the Constitution of Missouri, relative to the appellate jurisdiction of the Supreme Court.

The Supreme Court in the case of Parker v. Zeisler, 139 Mo. 298, said with regard to Section 12, Article VI, Constitution of 1875, which insofar as this question is concerned is unchanged as Section 3, of Article V, of the present Constitution, l. c. 300:

"We are most positively of the opinion that it is our duty to adhere to the rulings announced heretofore, holding that a city within a county is not a political subdivision of the State (as that term is used in the section of the Constitution under review)."

(Emphasis ours).

We believe that the holding that a city is not a political subdivision in this State is limited only to the provisions of Section 3, of Article V, of the Constitution, and that the reference in Section 1.10 of House Bill 1001 to political subdivisions includes cities.

It is therefore the opinion of this office that the City of Fulton is a political subdivision within the meaning of Section 1.10 of Senate Revision Bill 1001 quoted by us above.

CONCLUSION

It is the opinion of this department that Article 19, R. S. Mo. 1939, as amended by House Revision Bill No. 2052 of the 65th General Assembly of Missouri, applies to the City of Fulton, Missouri, and that its effective date is January 1, 1951.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPW:hr

PUBLIC BUILDINGS:
CORRECTIONS, DEPARTMENT OF:
LEGISLATION :
REVISION LAWS:

Revision of all statutes bearing on the same subject-matter do not affect construction. Department of Corrections subject to provisions of Act setting forth the duties and responsibilities of the Director of Public Buildings.

August 10, 1950

8/10/50

Honorable Ben Marvin Casteel
Director
Department of Corrections
Jefferson City, Missouri



Dear Mr. Casteel:

This is in reply to your request for an opinion which is as follows:

"I wish to request an opinion from your office relative to the following matters:

"1. Section 217.13 of Senate Bill No. 1069, Truly Agreed and Finally Passed (Revision), states as follows:

"The director and governor shall decide what improvements are necessary, not otherwise provided by law, which improvements shall be made under the direction and supervision of the division. In making any necessary improvements under the provision of this section, the division may, if in its discretion it shall be necessary, employ the services of an engineer, draughtsman or architect to make such plans and specifications as may be necessary therefor'.

"As you no doubt know, the engineering section of the division of penal institutions is charged with maintenance, repairs and replacements, new construction, operation of power-generating equipment

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and other mechanical equipment. It is frequently necessary to make emergency repairs at all hours of the day and night when it would be impossible to clear such matters through the Department of Public Buildings.

"Senate Bill No. 1068, Truly Agreed to and Finally Passed (Revision), Section 216.02, Paragraph 5, states:

"To have control and jurisdiction of all real estate, buildings, equipment, machinery, facilities and products properly belonging to or used by or in connection with any of said institutions and branches thereof".

"2. Does this not give us the authority to carry on the above mentioned functions of the engineering section?

"3. Does not the revision bills supercede the authority given the Department of Public Buildings in the Laws of 1945 and relieve them from control of the purchase of land, new construction, repairs and replacements, operation and installation of power-generating and mechanical equipment?"

The first question which must be answered in connection with your request is the effect of revision bills upon the law as existing and as interpreted. In the case of State ex rel. McElanahan vs. DeWitt, et al., 160 Mo. App. 304, the Court said, l.c. 307:

"* * * The different sections relating to the same subject and found in the same revision must for the purpose of construction be regarded as in pari materia. * * *."

465: In 50 Am. Jur. the following rule is stated at l.c.

"* * * Indeed, it is a settled rule of construction that where the entire legislation affecting a particular subject-

Honorable Ben Marvin Casteel

matter has undergone revision and consolidation by codification the revised sections will be presumed to bear the same meaning as the original sections and will generally be so construed. The legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation. * * * ."

From the above it is seen that when construing revised or codified statutes, different sections relating to the same subject must, for the purpose of construction, be regarded as in pari materia. Since all the sections are carried over in the revision, we must seek the legislative intent from the language used and must bear in mind that the revised sections should receive the same construction as the original sections. Statutes in pari materia, even though enacted at different dates, are to be construed together, and if possible, given such construction as will harmonize and give effect to all provisions. (State ex inf. Barker vs. Koeln, 270 Mo. 174, 192 S.W. 748).

You have noted in your opinion request that the 65th General Assembly has provided in Senate Bills Nos. 1068 and 1069 for a continuation of the authority and duties of the Director of the Department of Corrections in relation to control and jurisdiction of real estate, buildings, equipment and improvements.

With only technical changes necessary to comply with the new departmental set-up, Section 217.13 of Senate Bill 1069 is the same as Section 9070, R.S. Mo. 1939. Section 9070 was originally enacted in 1917, and is as follows:

"Said commission and governor shall decide what improvements are necessary, not otherwise provided by law, which improvements shall be made under the direction and supervision of the commission. In making any

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necessary improvements under the provisions of this section, the commission may, if in its discretion it shall be necessary, employ the services of an engineer, draughtsman or architect to make such plans and specifications as may be necessary therefor."

Said Section 9070 was in force at the time of the passage of an Act by the 63rd General Assembly making provision for a department of state government to be known as the Division of Public Buildings, and assigning the duties and responsibilities of the Director of Public Buildings.

"(d) The director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the Director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the Director: Provided, that there is excepted herefrom the design, architectural services, construction, repair, alteration or rehabilitation, of all laboratories, libraries, class-rooms, technical buildings used for teaching purposes, and those buildings or utilities serving such educational units, and any building or teaching unit built wholly or in part from funds other than State appropriations."

(Laws of Missouri, 1945, page 1463, Section 118 (d)).

This section has been carried over in substantially the same form in Senate Bill No. 1003, enacted by the 65th General Assembly and signed by the Governor on December 31, 1949.

Honorable Ben Marvin Casteel

You also make mention in your opinion request of Section 216.02(5) of Senate Bill No. 1068 of the 65th General Assembly. This is a revision bill and the substance thereof is to be found in an Act passed by the 63rd General Assembly, found in Laws of Missouri, 1945, at page 727, Section 11. This section reads as follows:

"In all laws of Missouri or parts thereof, the words 'department of corrections' shall be substituted for the words 'commission of penal institutions' with respect to institutions and activities pertaining to intermediate and adult offenders. Said department shall hold and exercise control and jurisdiction over all intermediate and adult correctional and penal institutions and activities in this state, except such powers and duties as may be assigned to the board of probation and parole, supported in whole or in part by the direct appropriation of money out of the state treasury, including the state penitentiary, the women's branch of the state penitentiary, the intermediate reformatory for young men at Alcoa, and over any other correctional institution for intermediate and adult offenders as may hereafter be established; and over all the branches of such institutions, and over all the real estate, building, equipment, machinery, facilities and products properly belonging to or used by or in connection with said institutions and branches thereof, and over the activities of these institutions and branches; and the department shall make and enforce such orders and findings as it may from time to time deem necessary and proper in the management of all institutions and persons committed to its control and shall be vested with and possessed with all other powers and duties necessary and proper to enable it to carry out fully and effectively all the purposes of this act."

An examination of the law pertaining to the duties and responsibilities of the Director of Public Buildings shows that he "shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings." We fail to see how the authority given the said Director by this section is in such conflict with the powers and duties vested in the Director

Honorable Ben Marvin Casteel

of the Department of Corrections by the sections referred to above that they may not be harmonized. You will note that the Legislature used the terminology "advisor and consultant" in describing the Director's duties in relation to the obtaining of architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. Therefore, it would seem apparent that the Director of the Department of Corrections is primarily obligated to care for the buildings under his supervision. However, to assist him in carrying out this work the Legislature has provided the office of the Director of Public Buildings, and further provided that there should be appointed thereto, a person "qualified by training and experience to deal with construction, operation, maintenance and repair of buildings, and shall be of recognized competence in the field of building administration." (Laws of Missouri, 1945, page 1462, Section 112.)

However, we believe the Legislature showed an unmistakable intent that the Director of Public Buildings must approve contracts for repair, rehabilitation or construction of buildings. Note the following language used in connection with the duties and responsibilities of the Director of Public Buildings. "No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the Director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the Director." We think that the above provision can readily be harmonized with the sections dealing with the authority given to the Director of the Department of Corrections. These provisions do not relieve the said Director of Corrections of his primary duty to let the contracts for the repair, rehabilitation and construction of buildings. They do make it mandatory that in such instances he secure the service of a public officer qualified in the field by requiring the approval of the Director of Public Buildings before such contracts are let and before claims are accepted for payment.

Further than this we may also have recourse to the rule of statutory construction "expressio unius est exclusio alterius" (mention of one thing in a statute implies exclusion of another) in aid of the fundamental objective which is to ascertain the intent of the Legislature. You will note that the statute has excepted any duties and responsibilities of the Director of Public Buildings in relation to buildings or utilities serving educational units. Because of this exception, we must give full effect to the all-inclusive language

Honorable Ben Marvin Casteel

used by the Legislature in setting out the duties of the Director of Public Buildings in relation to all other departments. Note that the Legislature used the language "all department heads" and also "no contracts shall be let." The only exception made was in relation to buildings serving educational units. Therefore, unless another intent is manifested, and we find none, we must conclude that the Legislature intended to include all other state departments.

In your request you also indicate a desire to have answered the question of whether the Division of Penal Institutions is charged with maintenance, repairs and replacements, new construction, operation of power-generating equipment and other mechanical equipment. There is also the question of emergency repairs at all hours of the day and night, when it would be impossible to clear such matters through the Division of Public Buildings.

We have already considered this matter with regard to new construction, repairs and replacements. In reference to the other matters mentioned we call your attention to Section 216.20 of Senate Bill No. 1068, which provides, in part, as follows:

"The department of corrections shall have the following powers:

* * * * *

"3. To have control and jurisdiction over all intermediate and adult correctional and penal institutions and activities in this state supported in whole or in part by the direct appropriation of money out of the state treasury, including the state penitentiary, the women's branch of the state penitentiary, the intermediate reformatory for young men at Algoa and over any other such correctional and penal institution which may hereafter be established, except such powers and duties as may be assigned to the board of probation and parole.

* * * * *

"5. To have control and jurisdiction of all real estate, buildings, equipment, machinery, facilities and products properly belonging to or used by or in connection with any of said institutions and branches thereof.

Honorable Ben Marvin Casteel

"6. To make and enforce such rules, regulations, orders and findings as it may deem necessary for the proper management of all institutions and persons committed to its control. "

We believe that the above sections are sufficient to endow the Department of Corrections with the control and management of the penal institutions insofar as your inquiry is addressed.

CONCLUSION.

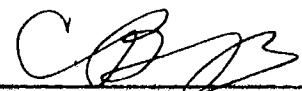
Therefore, it is the opinion of this department that the provisions pertaining to the duties and responsibilities of the Director of Public Buildings are applicable to the Department of Corrections. The Department of Corrections is charged with the duty of maintenance and repairs, operation of the power-generating equipment and other mechanical equipment used in the operation of the institutions under its control.

It is the further opinion of this department that the revision of existing statutes in substantially the same language does not affect the construction and interpretation of said statutes.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JRB:ir

WELFARE, DIVISION OF: Division of Welfare may receive federal grant for needy disabled persons.

September 7, 1950

9-7-50

Honorable Proctor N. Carter
Director, Division of Welfare
State Dept. of Public Health & Welfare
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"On August 28, 1950, President Truman signed the Social Security Act amendments of 1950, making several major changes in the Federal Social Security Act. This Act is known as H.R. 6000. A new Title XIV has been added to the Federal Social Security Act, providing federal grants-in-aid to needy permanently and totally disabled individuals 18 years of age or older, effective October 1, 1950.

"The question has arisen as to whether or not the State of Missouri could participate in making payments to totally and permanently disabled persons under the federal and state laws.

* * * * *

"We would appreciate receiving an opinion from you as to whether or not there are any legal inhibitions that would prevent the Division of Welfare from taking the necessary and required action to secure the full benefits of the above act of Congress relating to the payment of benefits to permanently and totally disabled persons."

Honorable Proctor N. Carter

As stated in your request, the Eighty-first Congress, by H. R. 6000, amended the Federal Social Security Act. By Title XIV of said amendment, which provides federal grants-in-aid to needy permanently and totally disabled individuals, eighteen years of age or over, said grants are given to the various states for distribution.

The rule as to the right of a state to receive and accept money is stated in 59 C. J., Section 276, page 164, as follows:

"A state has in general the same rights and powers in respect of property as an individual. It may acquire property, real or personal, by conveyance, will, or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit. The power of the state in respect of its property rights is vested in the legislature, and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose; and, where the state has not given its consent to the acquisition of property in a particular way, it is not entitled thus to acquire it. * * *

(Emphasis ours.)

We must therefore look to the statutes to determine whether the Division of Welfare of the State Department of Public Health and Welfare has been given the power to accept the federal grant in question.

Section 9416, R.S. Mo. 1939, provides that the Division of Welfare "is hereby directed to comply with the provisions of any act of congress providing for the distribution and expenditure of funds of the United States appropriated by congress for social security benefits, and to comply with any and all rules and regulations attached to or made a part of such appropriation act and not inconsistent with the Constitution and laws of Missouri."

Under Senate Bill No. 1062, enacted by the Sixty-fifth General Assembly, it is provided in part that the Division of

Honorable Proctor N. Carter

Welfare within the Department of Public Health and Welfare is designated as the state agency to administer state plans and laws involving aid for direct relief or any other duties relating to social security which may be imposed upon the Department of Public Health and Welfare.

In Laws of Missouri, 1945, page 945, it is provided that the department, through and on behalf of the division, is given the power to adopt orders and findings and to co-operate with the federal government in matters of mutual concern pertaining to any duties wherein the department and the division are acting as a state agency, including the adoption of such methods of administration as are found by the United States government to be necessary for the efficient operation of state plans.

The above statutes, we believe, are ample authority to empower the Division of Welfare to accept the grant in question.

Under House Bill No. 26 of the Sixty-fifth General Assembly the Division of Welfare is appropriated:

"All allotments, grants and contributions of funds from the Federal Government which may be received for the biennial period beginning July 1, 1949 and ending June 30, 1951, for the purpose of paying * * * other public welfare programs, * * *"

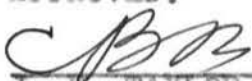
The above appropriation is broad enough to warrant the use of the money received from the federal government for the purpose for which it was granted.

CONCLUSION

It is, therefore, the opinion of this department that the Division of Welfare of the Department of Public Health and Welfare may secure and receive federal grants-in-aid to needy permanently and totally disabled individuals, eighteen years of age or over, provided for by Title XIV of the Federal Social Security Act.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

ARTHUR M. O'KEEFE
Assistant Attorney General

BONDS:

DIVISION OF WELFARE:

No statutory authority for ~~employees~~ ^{any employee}
of Division of Welfare to execute
surety bonds. ^{except director}

November 13, 1950

11/15/30

Mr. Proctor N. Carter, Director
Division of Welfare
Department of Public Health & Welfare
State Office Building
Jefferson City, Missouri

FILED

15

Dear Sir:

This will acknowledge receipt of your request to approve the enclosed \$1,000.00 surety bond wherein Thomas J. Barker, employee, Division of Welfare, is principal, and the Massachusetts Bonding and Insurance Company, the insurer, made payable to the Department of Public Health and Welfare, Division of Welfare, State of Missouri.

Heretofore similar surety bonds have received the approval of this department; however, that was prior to the enactment of two recent revision bills by the General Assembly of the State of Missouri, namely, Senate Revision Bill No. 1050 and Senate Revision Bill No. 1062.

Prior to the enactment of the foregoing revision bills, Section 9400, R. S. Mo. 1939, was still effective. That section reads:

"The Governor, by and with the advice and consent of the Senate, shall appoint a State Administrator at an annual salary of not to exceed \$6,000.00 who shall be a person qualified by education and experience to supervise the administration of the work of the State Social Security Commission, and shall have been a citizen and taxpayer of Missouri for not less than ten years and shall hold office for a term of four years. The State Administrator shall, with the consent of the State Commission, appoint such officers, employees, and others as may be required herein for the administration of any law imposing duties upon the State Commission or deemed necessary by the State Commission, and shall fix their duties, title, expenses and compensation within the

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limits of Appropriation laws. The State Administrator shall serve as executive and administrative officer of the State Commission. He shall prepare and submit to the State Commission, for its approval, an annual budget of all funds necessary to be expended by the State Commission. He shall prepare annually a full report of the administration of this or any other law, together with such recommendations and suggestions as he may deem advisable, and submit such report to the Governor. Each officer or appointee may be removed at any time by the appointing power in the same manner by which the appointment is required by law to be made. Members of the State Commission, the State Administrator and all officers appointed by the State Commission shall, before entering upon the duties of their office, take and subscribe an oath or affirmation, as required by the Constitution of Missouri. The State Commission may require a good and sufficient bond to be given by any officer or employee as the State Commission may designate in an amount and with sureties satisfactory to the State Commission, and in a form of bond approved by the Attorney General, conditioned upon the faithful discharge of the duties of the respective office or employment, and to account for all property and funds coming into their hands by, through and from such office or employment."

The foregoing provision vested in the Social Security Commission authority to bond employees and officers. Subsequent thereto, the 63rd General Assembly, in creating the Department of Public Health and Welfare, and particularly the Division of Welfare thereunder, vested in that body all the authority heretofore vested in the Social Security Commission, which had the effect of automatically transferring the power under Section 9400, supra, from the Social Security Commission to its successor in office, the Division of Welfare. However, subsequent thereto, the 65th General Assembly enacted Senate Revision Bill No. 1050, Section 191.01 specifically repealing Sections 1 and 7, page 945, Laws of Missouri, 1945 (known as Sections 9759.1 and 9759.7, Mo. R.S.A.), and also said General Assembly enacted Senate Revision Bill No. 1062, Section 207.1

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specifically repealing Sections 9759.31 and 9759.32, Mo. R.S.A., and Section 9400, R. S. Mo. 1939, without enacting in lieu thereof any provision for bonding employees and officers employed or appointed in said Division of Welfare. So, under the law presently in full force and effect in this state, there is no statute requiring such employees and officials in said Division to execute surety bonds to the Department of Public Health and Welfare, Division of Welfare. Undoubtedly this was an oversight on the part of the Legislature in enacting said revision bills.

There are some instances when certain employees or officers are required by law to execute surety bonds to the state, county or some political subdivision thereof and when there is no provision for the payment of the premium on said bond, that becomes an obligation of said employee or officer. In such case that is in the nature of a prerequisite to said employment or appointment. In *Berry v. Linn County*, 195 S.W. (2d) 502, 1.c. 503, the court said:

"The intent of Section 3238 is clear. It provides when an officer chooses to give a surety company bond, the cost of it shall not be imposed on the county unless the county agrees.

* * * * *

"The same contention *Berry* makes here has been previously presented to and denied by this court. *Cox v. Polk County*, Mo. Sup., 173 S.W. 2d 680, and *Motley v. Callaway County*, 347 Mo. 1018, 149 S.W. 2d 875. The latter case held that Section 3238 merely authorizes a county to make an agreement for a surety company bond and, if it does so in advance, to pay the cost of the bond when it is furnished."

Volume 46 C.J., Section 388, page 1063, lays down the general principle of law relative to requiring surety bonds of public officials and reads in part:

"Where an official bond is required of an officer without statutory requirement therefor, it is without legal effect except where the officer secures some direct pecuniary advantage, or it is otherwise sustained by a sufficient consideration. But it is held that a bond voluntarily given, although not

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required by statute, may be binding upon the parties where intended to serve a lawful purpose and not against public policy; and a public officer may give a particular security, not required by law, to parties whose interests are intrusted into his hands, for the faithful discharge of his duties toward them, which may be enforced as a common-law obligation."

Also in *Burton Machine Co. v. Ruth*, 196 Mo. App. 459, l.c. 465, 466, the court, in holding that a bond not authorized by statute if voluntarily given may be valid if it does not contravene public policy, said:

"A bond though voluntary and not authorized by any statute is valid if it does not contravene public policy nor violate any statute. (*Barnes v. Webster*, 16 Mo. 258.) And it is a well settled rule that a bond taken by a public officer in attempted compliance with a statute is good as a common law bond though it falls short of fulfilling the requirements of the statute." (*Lumber Co. v. Schwartz*, 163 Mo. App. 659, 664, 147 S.W. 501; *Lumber Co. v. Banks*, 136 Mo. App. 44, 117 S.W. 611; *Fellows v. Kreutz*, 189 Mo. App. 547, 176 S.W. 1080; *Uhrich v. Globe Surety Co. of Kansas City*, 191 Mo. App. 111, 166 S.W. 845.)"

However, we definitely do not have any statute requiring the execution of such a surety bond by said employees of the Division of Welfare. This is not a case of a statutory provision requiring a bond and an attempt being made to comply with such statute. Furthermore, there is absolutely no method by which the Department of Public Health and Welfare, Division of Welfare, can legally pay the premium on such surety bonds in the absence of statutory authority requiring the payment of premiums on such bonds and in the absence of any statute requiring such bonds to be executed. Section 28, Article IV, Constitution of Missouri, 1945, is a prohibition against the payment of such premiums by the Division of Welfare. Said section reads:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made

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by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."


Presently the only person employed by the Division of Welfare required to execute a surety bond is the Director of Welfare. Section 34, page 955, Laws of Missouri, 1945, Section 9759.34, Mo. R.S.A., provides that he shall enter into a good and sufficient bond payable to the State of Missouri for the faithful performance of his official duties and to account for all property and funds coming under his administration and control, said bond to be approved by the Attorney General and the premium on said bond to be paid by the State of Missouri.

CONCLUSION

It is the opinion of this department that the enclosed surety bond is not required under the laws of the State of Missouri, and, therefore, we cannot approve same; that presently the only statutory requirement for any employee or official of the Division of Welfare to execute a surety bond to the State of Missouri is the Director of Welfare. Before employees and officers of the Division of Welfare can be bonded by the State of Missouri, it will be necessary that the General Assembly of the State enact a law requiring such persons to execute bonds, and for the State to pay the premiums on said bonds, the law must specifically provide for payment of the premiums by the State.

Respectfully submitted,

APPROVED:

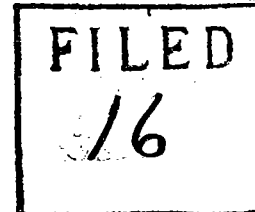

J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARH:VLM
Enc.

TAXATION) Sales tax not applicable to sales to Army Officers' and
) Noncommissioned Officers' Clubs.

March 31, 1950



Honorable L. M. Chiswell
Supervisor
Sales Tax Unit
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this Department, concerning the exemption from application of Missouri Sales Tax of purchases by officers' clubs and noncommissioned officers' clubs at United States Army installations in this state.

Section 11409, House Bill No. 303, Sixty-fifth General Assembly, exempts from the Missouri Sales Tax, among other transactions, "any retail sale which the State of Missouri is prohibited from taxing under the constitution or laws of the United States of America."

In the administration of the Missouri Sales Tax Act the taxable transaction upon sales of goods to clubs has been considered to occur at the time of the purchase by the club rather than at the time of the sale by the club to its members. In view of such application of the law, the question thus becomes one of whether or not a sale by a Missouri merchant to a commissioned or noncommissioned officers' club at Army installations is such a transaction as is exempt under Section 11409, because the State of Missouri may not under the Constitution or Laws of the United States tax such transaction.

Army officers' and noncommissioned officers' clubs are established pursuant to Army Regulations No. 210-60.

Paragraph 3 of such regulations provides:

"3. Definition.--a. Officers' and non-commissioned officers' clubs and messes as adjuncts of the Army at post level provide certain services essentially for the convenience, recreation, and social welfare of the officers, warrant officers, and

Honorable L. M. Chiswell

noncommissioned officers and their families stationed thereat. Clubs and messes may include such branches and departments as are necessary to conduct and control properly the activities authorized. Officer and noncommissioned officer club and mess funds are sundry funds as defined in AR 210-50, which together with these regulations will govern club and mess operations."

Paragraph 8 of such regulations provides:

"8. Legal Status.--Clubs governed by these regulations are integral parts of the Military Establishment, are wholly owned Government instrumentalities, and are entitled to the immunities and privileges of such instrumentalities except as otherwise directed by the War Department."

Subsection b. of Paragraph 29 provides:

"b. State.--Clubs and messes operated pursuant to these regulations are entitled to the same immunity from State and local taxes as are other instrumentalities of the United States."

We find no cases in which the question of immunity from state taxation of such clubs as those under consideration has been determined by the courts. The nearest analogy appears to be cases in which the matter of taxation of transactions involving Army post exchanges has been considered. In the case of Pan-American Petroleum Corporation v. Alabama, 67 Fed. (2d) 590, the Circuit Court of Appeals for the Fifth Circuit considered the question of the application of an excise tax imposed by the State of Alabama upon the sale of petroleum products to Army post exchanges situated in Alabama. The court held that the tax was applicable. In so holding, the court described a post exchange as follows at l. c. 591:

"Furthermore, a post exchange is, of course, not the government, nor is it a department

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or instrumentality thereof. On the contrary a post exchange is a voluntary, unincorporated cooperative association of Army organizations, in which all share as partners in the benefits and losses. The government has no share in the profits, and is not bound by the losses. We are, therefore, of the opinion that sales made by appellant to the post exchanges at Camp McClelland and Maxwell Field are not exempt from the state excise taxes."

However, in the case of Standard Oil Company v. Johnson, 316 U.S. 481, 86 L. Ed. 1611, the United States Supreme Court considered a California Statute which imposed a license tax measured by gallonage on the privilege of distributing motor vehicle fuel. Sales to the Government of the United States or any department thereof for official use of the Government were exempt under a provision of the law. The case before the Supreme Court involved the question of whether or not sales to Army post exchanges were subject to the tax. The court held that such sales were within the exemption provided for sales to the Government of the United States. The court discussed the status of post exchanges as follows: (86 L. Ed. 1. c. 1615.)

"On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law.

"Congressional recognition that the activities of post exchanges are governmental has been frequent. Since (March 2) 1903, Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges. In (March 4) 1933 and (June 26) 1934, Congress ordered certain moneys derived from disbanded exchanges to be handed over to the Federal Treasury. And in (June 16) 1936, Congress gave

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consent to state taxation of gasoline sold by or through post exchanges, when the gasoline was not for the exclusive use of the United States.

"The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

"From all of this, we conclude that post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties intrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error."

In view of the similarity between the authority for and the purposes and methods of operation of Army post exchanges and Army officers' and noncommissioned officers' clubs, we feel that the Standard Oil case may be relied upon for establishing the status

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of such clubs and holding that such clubs are likewise "integral parts of the War Department; share in fulfilling the duties intrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes." We perceive no reason for any distinction between commissioned officers' and noncommissioned officers' clubs in this regard.

Such being the status of the organizations under consideration, the question then is whether or not the doctrine of implied constitutional immunity of instrumentalities of the Federal Government from state taxation applies to the Missouri Sales Tax. This doctrine, which has as its basis the "rhetorical flourish" of Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheat. 316, that "The power to tax involves the power to destroy" has in recent years been subjected to limitation by the Supreme Court of the United States.

In the case of *Alabama v. King and Boozer*, 314 U. S. 1, a sales tax imposed by the State of Alabama was held applicable to a contractor engaged in the performance of a contract with the United States on a cost plus basis. The King and Boozer ruling was considered, by the Ninth Circuit Court of Appeals in the case of *Broadhead v. Borthwick*, 174 Fed. (2d) 21, sufficient grounds for upholding the imposition of a tax imposed by the Territory of Hawaii upon gross proceeds of sales to United States Army Post Exchanges. The tax there involved was imposed upon the vendor. The Missouri Sales Tax is, by its terms, imposed upon the vendee, (Section 11412, Laws of 1947, Volume II, page 431) although collected by the vendor (Section 11411, Laws of 1947, Volume II, page 431). However, no case has been decided in which a State Sales Tax has been upheld when the responsibility for the tax rested directly on the Government of the United States or an instrumentality thereof. (See Powell, *The Waning of Tax Immunities*, 57 Harvard L. Review 633, 657.) In the absence of such holding we feel that the intergovernmental immunity must still be considered applicable insofar as sales to the Government of the United States, or its instrumentalities, is concerned.

CONCLUSION

Therefore, this Department is of the opinion that sales to officers' and noncommissioned officers' clubs of the United States Army are sales to instrumentalities of the Government of the United States, and that the State of Missouri may not constitutionally impose a sales tax upon such transactions.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General

RRW/feh

STATE PURCHASING AGENT } State Purchasing Agent must purchase all
State printing.

January 6, 1950

Filed 17

Mr. Leo J. Clavin
State Purchasing Agent
Jefferson City, Missouri

Attention: Mr. Roy E. Sibley

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"This letter is addressed to you requesting your interpretation of certain phases of the law relative to the purchase of state printing, binding and paper.

"Section 76, page 1453, Laws of Missouri, 1945, state 'The State Purchasing Agent shall purchase all public printing and binding of the state,'-- same section further states 'it shall be the duty of all state offices to order all of their printing and binding through the State Purchasing Agent.' Section 80, pages 1454 and 1455 of the same laws states 'provided that printing jobs of less value than \$50.00 may be purchased on the open market if approved by the Comptroller.

"With reference to the provision of Section 80, is it the intent that state departments may purchase printing in the amount of \$50.00 by a Direct Departmental order, or does this section mean such state departments shall submit a requisition to the State Purchasing Agent and the State Purchasing Agent is then authorized to make such purchases on the open market?



Mr. Leo J. Clavin

"Section 81, page 1455 states as follows: 'All accounts accruing under this law shall be submitted by the vendor to the State Purchasing Agent who shall examine such accounts, etc.' Is it necessary under the provisions of this section that all invoices for printing, binding and paper be submitted directly to the Office of the State Purchasing Agent, or is it permissible for the vendor to submit invoices directly to the officer for whose department the work was done and that officer in turn submit such invoices to the State Purchasing Agent for approval?

"Citing a hypothetical example. A certain number of printed forms are used by all of the various state departments. A printing firm prints and pads a large number of these forms. Can the departments using these forms order same on a Direct Departmental Order by-passing the Office of the State Purchasing Agent, or is such department, required by law to submit their requisition to the State Purchasing Agent and he in turn issue a purchase order to cover? This printer has no contract from the Office of the State Purchasing Agent authorizing the printing of the form in question.

"We would appreciate your opinion relative to the above questions which have arisen in connection with the sections referred to."

Section 76 of Laws of Missouri, 1945, page 1428-1453, provides:

"The State purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court.

Mr. Leo J. Clavin

In such capacity the state purchasing agent is hereby empowered and authorized to take over as a part of the records of his office, all books, documents, and records which are now in the hands of the Commissioners of Public Printing and the Secretary of State relative to public printing. It shall be the duty of all state officers to order all of their printing and binding through the state purchasing agent. The purchasing agent may authorize any state penal, eleemosynary or educational institution, to procure all or any part of its own printing and binding."

Section 80 of the same act provides:

"The state purchasing agent shall have the public printing of the state executed upon competitive bids, and shall award the contract to the lowest responsible bidder and shall in all instances reserve the right to reject any and all bids; provided that printing jobs of less value than \$50 may be purchased on the open market if approved by the comptroller. The purchasing agent may combine orders or subdivide individual jobs for the purpose of advertising and contracting as shall be to the best interests of the state. The purchasing agent shall exercise diligence in soliciting bids from all printing firms in the state that might reasonably be expected to be interested in bidding on any particular item and shall at all times endeavor to maximize competition among potential bidders. Bonds satisfactory to the purchasing agent shall be given by the parties to whom contracts are awarded, to secure the faithful performance of such contracts."

We think that the foregoing sections clearly provide that all printing is to be purchased by the State Purchasing Agent. The provisions of Section 80, regarding the purchase of printing jobs of less than Fifty Dollars (\$50.00) on the open market,

Mr. Leo J. Clavin

are an exception to the requirement that the printing should be executed upon competitive bids and is not an exception to the requirement that all printing be purchased by the State Purchasing Agent.

Section 81 of said act provides:

"All accounts accruing under this law shall be submitted by the vendor to the purchasing agent who shall examine such accounts to ascertain if the printing delivered by the contractor complies in all ways with the specifications and the contract governing the same, after which said accounts shall be presented to the officer for whose department the work was done who shall likewise examine the account before submitting it to the comptroller for payment. The purchasing agent shall keep a record of the cost of printing and binding and a copy of each document shall be duly filed and preserved by him, with the number of copies ordered and delivered and the cost indorsed thereon. The cost of all printing and binding, including annual reports, shall be charged to the appropriation of each agency ordering the same."

This section quite clearly sets out the procedure to be followed and the presentation of accounts for printing. The account is first to be submitted to the Purchasing Agent for his approval, and then to the officer for whose department the work is done.

As far as the hypothetical example cited in your letter, we feel that the question is answered by the foregoing, and that the department is required to submit its requisition to the State Purchasing Agent, and he in turn is to purchase the printing required.

CONCLUSION

Therefore, it is the opinion of this department that all state printing is required to be purchased by the State Purchasing

Mr. Leo J. Clavin

Agent, and that the Fifty Dollar (\$50.00) exemption for purchases without competitive bidding provided by Section 80, Laws of Missouri, 1945, pages 1428-1454, is an exemption from the requirement of competitive bids and does not authorize purchase of printing in such amounts other than through the State Purchasing Agent.

We are further of the opinion that accounts for printing are required to be submitted first to the State Purchasing Agent for his approval, and then to the head of the department for which the printing was purchased for his approval.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General

RRW/feh

ASSESSORS: Counties of third class may not pay for
COUNTY COURTS: compensation of deputy assessors or clerks.

February 4, 1950



Honorable James D. Clemens
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"A question arises as to whether the County Court has the power to pay the salary of a clerk for the Assessor. The clerical work required of the Assessor has become such that the Assessor himself can no longer perform all of the clerical duties and still perform the principal duties imposed upon him by his office in making assessments. Further, it is felt that the office of the Assessor should be kept open to the public, and the Assessor cannot keep regular office hours and still cover the outlying districts of the County as he must do to properly assess the real and personal property of the County.

"The Assessor believes that he can best perform his duties if he has a clerk to assist in the clerical work and be present at all times in the office in the Courthouse. The County Court believes that such a clerk would aid to the Assessor's efficiency. Under these circumstances, is the County Court justified in obligating the County for the additional charge of hiring such a clerk for the Assessor?

Honorable James D. Clemens

"Your opinion of April 29 concerning the hiring of extra stenographic help by a County Assessor has been carefully studied, but that opinion is based on a different situation in that there the question involved the hiring of extra stenographic help, rather than basic clerical help. It will be appreciated if you will give your opinion concerning the question outlined above."

As pointed out in your request, this department, in an opinion rendered to Mr. J. W. Thurman, Prosecuting Attorney of Jefferson County, dated April 29, 1949, held that county courts in counties of the third class may in their discretion reimburse a county assessor for necessary stenographic hire. As mentioned in your request, the opinion related only to stenographers and did not pass upon the question of the pay of deputies.

The question you have presented is whether the county court may pay the salary of a clerk for an assessor of a county of the third class, such as Pike County. Section 5, Laws of Missouri, 1945, page 1782 (Section 11000.4, R.S.A.), provides as follows:

"Every assessor, except in the City of St. Louis, may appoint as many deputies as he may need, to be paid as provided by law. Each deputy shall take the same oath and have the same power and authority as the assessor himself. The assessor shall be responsible for the official acts of his deputies." (Emphasis ours.)

In the case of State ex rel. Hackmann, 305 Mo. 342, our Supreme Court held that a general statute relating to compensation of "deputies" of an assessor included the compensation that was to be paid the clerks in the assessor's office.

A review of the statutes relating to assessors and their deputies in counties of the third class discloses no provision for the pay of such deputies. It will be noted that in counties of the second class it is specifically provided as to how deputy assessors may be paid (Laws of Missouri, 1945, page 1552, Section 10996.13, R.S.A.). In the case of Alexander v. Stoddard County, 210 S.W. (2d) 107, the Supreme Court held that the county was not liable for the payment of a deputy hired by a county treasurer and ex officio collector because the statutes relating to the

Honorable James D. Clemens

office of collector simply provided that the deputy should be paid out of the fees collected by the officer. The court reviewed the earlier cases relating to the right of a county officer to be reimbursed for necessary outlay in the conduct of his office. The court then pointed out that, under the statutes in question, "whether they do or do not authorize such deputies, they plainly indicate the source of their pay and limit it to 'fees and commissions earned and collected by such officer only and not from general revenue.'" The same situation is present in the instant case because the Legislature has specifically provided that the deputy assessors and clerks shall "be paid as provided by law."

As there is no provision by law for the payment of deputy assessors and clerks in counties of the third class, we believe that the county court could not obligate the county for the payment of the compensation of said employees. What was further said in the Alexander case, supra, is especially applicable to the facts which you present. The court, through Judge Barrett, said, l.c. 109:

"In any event the legislature has the power to fix and limit the salaries of deputies and 'As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement. * * * Under other statutes deputies are to be paid by the principal out of the fees received by him in excess of the amount which he is to retain for himself, and the county is not liable for the salaries of such deputies.' * * *"
(Emphasis ours.)

Therefore, it appears that while an assessor of a county of the third class may employ as many deputies as he may need, still the county court may not pay for said deputies out of county funds, but said deputies must look to the assessor for their compensation.

Honorable James D. Clemens

CONCLUSION

It is, therefore, the opinion of this department that county courts of counties of the third class may not pay the compensation of a deputy assessor or clerk.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ml:BJ

INHERITANCE TAX: A conveyance of real estate without an adequate
CONVEYANCES: and full consideration by which the grantor or
transferor retains or secures a life estate with
remainder in fee simple to the children of the
grantor is taxable upon his death as property
subject to the Missouri inheritance tax.

December 7, 1950



Mr. James D. Clemens
Prosecuting Attorney
Bowling Green, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
official opinion of this department which request is as follows:

"I seek your opinion as to whether an
Inheritance Tax is due the State of Missouri
under the following circumstances. Some
18 years ago the decedent without consideration,
conveyed his land to a straw party, who recon-
veyed to the decedent for his natural life,
with remainder in fee simple to the four
children of the decedent. The decedent's
estate is now in the process of administration
and consists only of personal property."

Section 571, R. S. Mo. 1939, was amended twice by the 61st
General Assembly of 1941. We copy herewith said Section 571 as
amended by Laws Mo. 1931, page 130; Laws 1941, page 281:

"A tax shall be and is hereby imposed upon
the transfer of any property, real, personal
or mixed, or any interest therein or income
therefrom, in trust or otherwise, to persons
institutions, associations, or corporation, not
hereinafter exempted, in the following cases:
When the transfer is by will or by the intestate
laws of this state from any person dying possessed
of the property while a resident of the state.
When the transfer is by will, or intestate law
of property within the state or within the juris-
diction of the state and decedent was a non-
resident of the state at the time of his death."

Mr. James D. Clemens

When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, in trust or otherwise and the transferor has retained for his life or any period not ending before his death, (1) the possession or enjoyment of or the income from the property, or (2) the right to designate the persons who shall possess or enjoy the property or income therefrom, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein or income therefrom, whether the transfer thereof is made before or after the passage of this law: Provided, that property which is actually vested in such persons or corporations before this law takes effect shall not be subject to the tax, and provided further that nothing herein contained shall be construed as imposing a tax upon any transfer as defined in this Act, of intangibles, however used or held, whether in trust or otherwise, by a person, or by reason of the death of a person, who was not a resident of this state at the time of his death." (underscoring ours.)

We have requested additional information from you in order to ascertain whether or not the deeds were executed and delivered before or after the effective date of the amendment of this section by Laws Mo. 1939, page 130, which added the sentence underscored above beginning with the words, "when the transfer" and ending with the words "or money's worth."

Mr. James D. Clemens

Your second letter dated December 2, 1950, reads as follows:

"In response to your letter of November 29 requesting additional information in connection with the question of Inheritance tax, I have the following information to submit:

"The deed from the decedent to the straw party was dated November 29, 1931, and was recorded December 2, 1931. The deed from the straw party to the decedent was executed on December 1, 1931 and was recorded on December 2, 1931. There is no indication as to the actual time of delivery other than it may be assumed delivery was some time between the dates of execution and the dates of recording."

Laws Missouri, 1931, page 130, that amended this section quoted above, was approved May 1, 1931, and became effective September 14, 1931. Therefore, the amendment of Section 571, which we have underscored, was in effect when the deeds were executed and delivered by the parties.

The property is taxable by virtue of said amendment to said section 571.

The Supreme Court of Missouri in the case of Friedman v. Jamison (1947) 202 S.W.2d 900, 1.c. 903, has recently held that:

"* * *The inheritance tax of Missouri is a tax on the privilege of receiving or taking property rather than on the transfer or transmission of property at death. The incidence of the tax falls upon the recipient of the property. In re McKinney's Estate, 351 Mo. 718, 173 S.W.2d. 898; In re Rosing's Estate, supra."

CONCLUSION

It is the conclusion of this department that a conveyance of real estate, without an adequate and full consideration, by which the grantor or transferor retains or secures a life estate with remainder in fee simple to the children of the grantor is taxable upon his death as property subject to the Missouri Inheritance Tax.

Respectfully submitted,

APPROVED:

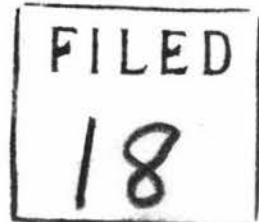
STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

ELECTIONS

Four Judges and two Clerks are to be present at each Precinct in the City of St. Louis at special election to be held April 4, 1950.

January 10, 1950



Board of Election Commissioners
City of St. Louis
208 South Twelfth Blvd.
St. Louis, Missouri

Attention: Joseph P. Uxa, Chief Assistant

Gentlemen:

This is in answer to your letter of recent date requesting an official opinion of this department, and reading as follows:

"We are making preparations for the holding of the Special Election Tuesday, April 4, 1950, and one of the first steps is the filling of vacancies that have arisen in the ranks of Judges and Clerks of Election.

"It is our understanding that the regular quota of six election officials - four judges and two clerks - must be on duty in each polling place in St. Louis, as Section 11682 of the R. S. of Missouri, 1939, although providing that only two judges and two clerks shall officiate at the polls states 'except that in cities and counties where registration of voters is now conducted for by law, that said special elections shall be held in accordance with the provisions of the law now in effect applicable to the holding of elections in said cities and counties.'"

Section 11682, R. S. Missouri, 1939, which you refer to in your letter, provides as follows:

"Whenever a proposed amendment to the Constitution or the proposition: 'Shall there be a convention to revise and amend the

Bd. of Election Commissioners

Constitution?' shall be submitted to the voters at a special election, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions are submitted at a general election: Provided, that it shall not be necessary to hold said election with booths for the voters and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and next to the highest number of votes for governor at the last general election; except that in cities and counties where registration of voters is now provided for by law that said special elections shall be held in accordance with the provisions of law now in effect applicable to the holding of elections in said cities and counties: Provided further, that the secretary of state shall provide for the same publication in newspapers and the same posting of notices at voting places of the proposition, 'Shall there be a convention to revise and amend the Constitution?' as is provided by law in the case of proposed constitutional amendments."

We believe it to be clear that the exception as to cities and counties, where registration of voters is now provided for by law, obviously excepts the City of St. Louis from being affected in any way by such statute since St. Louis is a city where registration of voters is now provided for by law.

Section 12199, R. S. Missouri, 1939, relating to registration of voters and conduct of elections in cities of 600,000 or more, provides in part as follows:

"Said board of election commissioners shall at least sixty days prior to each presidential election thereafter select and choose four

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electors as judges of election, for each precinct in such city. * * * Two clerks of election for each precinct shall be selected within the same time by said board, and shall possess the same qualifications as the judges. * * * Said judges and clerks shall be appointed for a term ending sixty days prior to the next presidential election after the election at which they were appointed to serve, and shall, during said term, serve as judges and clerks at all special, local, municipal, primary and general elections. * * *

(Underscoring ours.)

Since such section specifically provides that the judges and clerks provided for in such statute shall serve as judges and clerks at all special elections, we believe it to be clear that at the special referendum election to be held April 4, 1950, that four judges and two clerks shall serve for each precinct in the City of St. Louis.

CONCLUSION

It is the opinion of this department that at the special referendum election to be held April 4, 1950, that four judges and two clerks shall serve in each precinct in the City of St. Louis.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATE COURT: The summons of jurors in the magistrate court may be signed by either the judge of the magistrate court or the clerk of the magistrate court.

February 7, 1950

Mr. E. Wayne Collinson
Prosecuting Attorney
Springfield, Missouri



Dear Sir:

I.

We have received the following request for an official opinion of this department:

"There has arisen today a question under Section 7 of Senate Bill 207 which provides for the summoning of a jury in Magistrate Court. The facts are these:

"The Clerk of the Magistrate Court went to the County Clerk and obtained a list of twenty-four names from the list of jurors for the Magistrate Court. The Clerk then issued summons for each person on the list and the summons were signed by the Honorable W.K. Webb, Judge of Magistrate Court, Division No. 1, of Greene County, Missouri. When this jury was called to be used in Judge Gideon's division, which is Division No. 2 of the Magistrate Court, he turned the jury loose on the grounds that they were illegally summoned because the statute provides that 'the Clerk of the Magistrate Court shall summons each person on said list by registered mail', and that the summons were signed by Judge Webb and not the Clerk.

"Please advise whether or not a jury summoned by registered mail by a Magistrate would be a legal jury."

Section 2811.252, R.S.A., Laws 1947, Vol. 1, page 248, Sec. 7 provides for the summoning of jurors:

"Upon receipt of the list of names certified by the county clerk, the clerk of the magistrate court shall summons each person on said list

Mr. E. Wayne Collinson

by registered mail, requesting a return receipt signed by addressee only, to appear before the magistrate on the date fixed by the magistrate and each person so summoned shall appear in obedience to such summons and shall serve as a juror until excused by the magistrate, but no juror shall be required to serve more than five days in any twelve month period after the first day of May."

Section 2811.125, R.S.A. Laws 1945, page 765, Sec. 25, provides as follows:

"All process issued by magistrates shall run in the name of the state of Missouri, to be dated on the day issued, and shall be signed by the magistrate or clerk."

This latter statute is considered by us to be the controlling statute in the question created by your statement of facts.

The clerk signs the process for and on behalf of the magistrate in all magistrate courts. But that does not mean that the magistrate cannot or should not sign process or writs issued by his court.

The question of whether or not a summons for a jury is included within the clause "all process" has been fully considered by this department.

A list of grand jurors and alternates, petit jurors and alternates, selected by the county commissioners and furnished the sheriff as provided by the laws of Arkansas would be a process, entitling the sheriff to the fees provided in service of process according to the Supreme Court of Arkansas. In Williams v. Hempstead County, 39 Ark. 176, l.c. 179.

"A list of grand jurors and alternates, petit jurors and alternates, selected by the county commissioners and furnished the sheriff as provided by Gantt's Dig. Sec. 3677 et seq., would be a process, and properly--to use a familiar legal designation--a writ of venire facias, entitling the sheriff to the fees provided in service of process. Williams v. Hempstead County, 39 Ark. 176, 179."

Hon. E. Wayne Collinson

To constitute "process" in court procedure, it is essential that the document or writ must contain a direction or demand that the person to whom it is directed shall perform or refrain from the doing of some described act according to the court. In *Re Smith's Will*, 24 N.Y.S.(2d) 704, 1.c. 710.

As a legal term "process" is a generic word of very comprehensive signification and many meanings. In its broadest sense it is equivalent to or synonymous with proceedings or procedure and embraces all the steps and proceedings in a cause from its commencement to its conclusion according to the Supreme Court of New Mexico in *State ex rel. Dresden v. District Court*, 112 P.(2d) 506, 509, 45 N.M. 119.


The word "process," as generally used, is understood to mean a writ, warrant, subpoena, or other formal writing issued by authority of law; but it also refers to the means of accomplishing an end including judicial proceedings. *Gollobitsh v. Rainbow*, 51 N.W. 48, 49, 84 Iowa, 567.

The clerk of the magistrate court only has such powers and duties as given to the magistrate court by law and the judge of the magistrate court has the power to perform any of the functions of the magistrate court, within the jurisdiction of the magistrate court as defined by law. The clerk does not have any powers or authority that the judge of the magistrate court does not have.

CONCLUSION

It is the opinion of this department that the summons of jurors in the magistrate court may be signed by either the judge of the magistrate court or the clerk of the magistrate court.

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw 

ELECTIONS: Judges and clerks of special referendum election in Kansas City are to be paid half by Kansas City and half by Jackson and Clay counties.

February 27, 1950

FILED NO. 18

Board of Election Commissioners
Kansas City, Missouri

Attention: Mr. Elmo B. Hunter
Mr. W. Raymond Hedrick
Attorneys



Gentlemen:

This is in answer to your letter of recent date requesting an official opinion of this department, and propounding the following question:

"Referring again to the special constitutional amendment election of April 4, 1950, concerning the proposed increase in gasoline tax, the Board of Election Commissioners requests an opinion as to whom should bear the expense of the judges and clerks to be used in said election. With regard thereto, we direct your attention to Sections 12184, 12185, and 12186 of the General Laws regulating elections, which appear to bear upon that question. You will recall from our recent conference with the Governor, a representative of your office a representative of the Election Board, and a representative of Jackson County, Missouri, that the question was discussed, and that it was suggested that the opinion include any possible liability upon the State, Jackson County, Clay County, and the City of Kansas City, Missouri, for that expense."

Your attention is called to the fact that this is not a special constitutional amendment election, but is a special election for the people to approve or reject House Committee Substitute for House Bill No. 185, enacted by the 65th General Assembly.

We find no constitutional or statutory provision authorizing the State of Missouri to pay judges and clerks for serving at a special referendum election. Therefore, it is our opinion that the state is in no way liable for such costs. We believe that Article 23, Chapter 76, Mo. R.S.A., determines the liability for the payment of clerks and judges of such election. Section 11885, Laws of Missouri, 1947, Vol. I, page 288, found in Article

Board of Election Commissioners

17, Chapter 76, Mo. R.S.A., relating to counties of 150,000 or over, applies, we believe, only to that part of Jackson County located outside of Kansas City. While the reference in Section 11851, R.S. Mo. 1939, which is the first section in Article 17, Chapter 76, Mo. R.S.A., states that the article is applicable only to that part of a county outside of cities having a registration as provided in Article 22, Chapter 76, R.S. Mo. 1939, which article applies to cities over 100,000 and which article has been repealed, the case of State ex rel. Kirby, 136 S.W. (2d) 319, decided by the Supreme Court of Missouri, held that a claim by a person assisting in registration of voters of Kansas City was allowable against Jackson County for half the pay of such person and should be paid by Jackson County under authority of what is now Article 23, Chapter 76, Mo. R.S.A., which article is applicable to cities of more than 300,000 and less than 700,000. It is our view, therefore, that the provisions of Article 23, Chapter 76, Mo. R.S.A., alone are determinative of the question contained in your opinion request. We might add that this conclusion is strengthened by the fact that the Legislature recognized such to be the correct interpretation in enacting Section 113.50 of House Revision Bill No. 2051. Such section provides as follows:

"In all counties of this state now having, or which hereafter may have, four hundred and fifty thousand inhabitants or over, there shall be a registration of all qualified voters; and the conduct of elections held in such counties shall be governed by the provisions of this article: provided, that where any city in such counties already has a system of registration as provided for in article 23, chapter 76, Revised Statutes of Missouri, 1939, this article shall not apply to such city, but only to such parts of such counties as lie outside the corporate limits of any such city."

Such House Bill was approved by the Governor on February 3, 1950, and will be in full force and effect ninety days after the January 14, 1950, adjournment of the Legislature.

We believe that the provisions of Article 23, Chapter 76, Mo. R.S.A., are applicable to the question stated in your opinion request rather than Section 11496, Laws of Missouri, 1945, page 882, the general law for the payment of judges and clerks by counties, insofar as Clay County is concerned.

Section 12184, Laws of Missouri, 1947, Vol. I, page 282, provides as follows:

Board of Election Commissioners

"In all cities not within counties the election commissioners and assistants employed by the board of election commissioners shall be paid by the city; in all other cities to which this article applies the salaries of the election commissioners and assistants shall be paid one-half by the city and one-half by the county. The members of such boards for cities now having or which may hereafter have a population of more than 300,000 or less than 700,000 shall receive a salary of three thousand dollars per year, payable monthly. The members of said board designated as the chairman and the secretary, respectively, shall be paid an additional salary of six hundred dollars per year, payable monthly. The chief assistant employed by each of said boards of election commissioners shall receive a salary of not to exceed three thousand three hundred dollars per year, payable monthly. Other assistants, not exceeding three in number for each board, shall receive a salary of not to exceed twenty-nine hundred dollars per year, payable monthly. Other assistants, not exceeding ten in number for each board, shall receive a salary of not to exceed twenty-six hundred dollars per year, payable monthly. All other additional assistants, if any, shall receive not to exceed seven dollars per day for the time actually employed. Compensation for overtime services necessarily and actually performed by any persons employed at the office of the board may be paid at the rate of such employee's regular pay. Precinct judges and clerks shall receive as pay seven dollars for each day or part of day while on duty, except pay shall be allowed only for those days mentioned in this article. All expenses incurred by said board of election commissioners, and all costs and expenses of registration and election in such cities shall be paid one-half out of the city treasury and one-half out of the county treasury. In cities not within a county, all shall be paid out of the city treasury, and all printing,

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binding, etc., shall be let by contract, subject to such regulations as are or may hereafter be prescribed by ordinance of any such city."

Section 12185, R. S. Mo. 1939, provides:

"At all city elections, general or special, though other than city officers may be elected at the same time with such city officers, and at all special elections in any part of the city, at which a city officer is elected, such city shall pay such judges and clerks of election for their services under this article."

Section 12186, R.S. Mo. 1939, provides:

"At all general, county and state elections which include officers elected through the whole county though other than state or county officers are also elected, and all special elections for a county or state officer or member of congress or member of the legislature, such county shall pay such judges and clerks of election for their services under this article."

Obviously, the special referendum election to be held April 4, 1950, is not such an election as is provided for in section 12185, supra. This special referendum election is not a general county or state election which includes officers elected through the whole county, nor does the election come within any other classification found in Section 12186, supra. We believe that that part of Section 12184 providing that all costs and expenses of registration and election in such cities shall be paid one-half out of the city treasury and one-half out of the county treasury applies, and that the costs must be paid half by the counties and half by the city because all costs are to be equally divided by the terms of such section, except insofar as excepted by Sections 12185 and 12186. It is clear that Sections 12185 and 12186 do not purport to cover all elections because we find in Section 12279, R.S. Mo. 1939, applicable to cities of 600,000 or over, the following provisions:

"At all general, county and state elections which include officers elected through the whole county, though other than state or

Board of Election Commissioners

county officers are also elected, and all special elections for a county or state officer or member of congress or member of the legislature, and any special election for any purpose whatever, such county shall pay such judges and clerks of election for their services under this article."

Section 12279, supra, was enacted at the same session of the Legislature as Sections 12185 and 12186 were enacted, both bills containing such sections being approved by the Governor on June 30, 1937, and it is clear that the Legislature knew that Sections 12185 and 12186 did not purport to cover all possible elections but intended to take care of elections not covered by Sections 12185 and 12186 in the all inclusive language of Section 12184, quoted supra.

Section 12095, R.S. Mo. 1939, applicable to cities of 300,000 to 700,000 population, defines "election" as follows:

"'Election' shall mean any general, special, municipal or primary election, unless otherwise specified."

Section 12181, R.S. Mo. 1939, provides, in part, as follows:

"The word 'election,' as used in this article, shall be construed to designate elections had within any city, for the purpose of enabling electors to choose some public officer or officers under the laws of this state or the United States, or to pass any amendment, law or other public act or proposition submitted to vote by law."

We believe such definitions do include the special referendum election to be held April 4, 1950, and that the only section which uses the term "election," as defined in such sections, i.e., the only section in which the word "election" is used without modification, is Section 12184, and that the provisions of such section govern the pay of judges and clerks in the special referendum election. Under the provisions of such section half the cost of judges and clerks should be paid by Kansas City, half the cost of judges and clerks in that part of Kansas City which is in Jackson County should be paid by Jackson County, and half the cost of judges and clerks in that part of Clay County annexed to Kansas City January 1, 1950, should be paid by Clay County.

Board of Election Commissioners

CONCLUSION

It is the opinion of this department that the cost of judges and clerks of Kansas City for the special referendum election to be held April 4, 1950, should be paid as follows:

- (1) Half the cost of such judges and clerks should be paid by Kansas City.
- (2) Half the cost of such judges and clerks in that part of Kansas City located in Jackson County should be paid by Jackson County.
- (3) Half the cost of such judges and clerks located in that part of Clay County annexed to Kansas City January 1, 1950, should be paid by Clay County.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS

} Contract of Board of Election Commissioners of Kansas City
extending beyond term of office of members entering into
such contract not invalid merely because of such fact.

March 15, 1950



Board of Election Commissioners
Kansas City 6, Missouri

Attention: Victor Z. Glennon

Gentlemen:

This is in answer to your letter of recent date requesting
an opinion of this department and reading as follows:

"We would like to have your opinion concerning the validity of a certain contract entered into by the former Board of Election Commissioners of Kansas City, Mo., for a term commencing January 12, 1949, to and including December 31, 1952. It is the opinion of the present Board that this contract entered into by their predecessors is not binding upon the present Board.

"The aforesaid contract was entered into on December 7, 1948 subject to acceptance by the Board on or before December 31, 1948.

"We would appreciate hearing from you at your very earliest convenience inasmuch as the contract covers the storage and delivery of certain election paraphernalia for each of the precincts in Kansas City."

The contract entered into December 7, 1948, for a term commencing January 12, 1949, and ending December 31, 1952, provides for the storage of certain items used in elections in Kansas City, such as tables, voting booths, saw horses, etc. Such contract also provides for the payment for the delivery of such election equipment

Board of Election Commissioners

and the return of such equipment to storage when each election is completed. Such contract also provides for the charge for necessary labor in connection with the delivery of the equipment, supplies and paraphernalia.

The contract between the election board of Kansas City and the Monarch Transfer & Storage Company, of course, is for a period of approximately four years and the term covered by the contract began three days before the date upon which the terms of office of the members of the election board who entered into the contract were scheduled to expire. In the case of *Aslin v. Stoddard County*, 106 S.W. (2d) 472, the county court of Stoddard County on December 31, 1932, employed a janitor of the court house and office building of Stoddard County for the succeeding year. Two of the members of the county court which hired this janitor were defeated in the August Primary of 1932, and, of course, ceased to be members of the county court at the beginning of the year 1933. The Supreme Court of Missouri said at l. c. 476:

"In *Manley v. Scott*, supra, the Minnesota Supreme Court had before it a question similar to that we are now considering. On December 31, 1908, the board of county commissioners appointed and by written contract employed one Shaffer as morgue keeper for the year 1909. The terms of two of the five members of the board expired at midnight that night, two new commissioners having been elected at the preceding November election. When the two new commissioners took office, soon after January 1, 1909, the board elected a new chairman and vice chairman, as required by statute, and attempted to rescind the contract with Shaffer and make a new contract with one Manley as morgue keeper for the year 1909. The court held that the board of county commissioners had power to make the contract with Shaffer when it was made and, 'Having the power at that time to employ a morgue keeper, there is no implied limitation upon that power which restricts the possible term of employment to the time when any member or members of the board shall go out of office'; and that, the contract with Shaffer being fair and reasonable

Board of Election Commissioners

and there being no question of fraud or collusion, said contract was binding and the board, after the qualification of the new members, had no power to rescind it without cause being shown. Speaking of the question of power of the board of county commissioners to 'make a contract with an employee which extends beyond the expiration of the terms of office of certain members of the board,' the court said, 108 Minn. 142, 121 N.W. 628, 629, 29 L.R.A. (N.S.) loc. cit. 655: 'While there is some apparent conflict in the authorities, it is reasonably clear that the weight of authority is to the effect that the board has such power,' citing numerous cases. The court further said (108 Minn. 142, 121 N.W. 628, 629, 29 L.R.A. (N.S.) loc. cit. 659), quoting approvingly from Board of Com'rs of Pulaski County v. Shields, 130 Ind. 6, 29 N.E. 385:

"It (the board) is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason.'

"In said case of Manley v. Scott the court mentioned as apparently announcing a 'somewhat different conclusion' from that which it said was supported by the weight of authority, practically all of the cases cited in the footnotes in 15 C.J., supra, and proceeded to discuss and distinguish those cases. See, also, notes to Manley v. Scott, supra, 108 Minn. 142, 121 N.W. 628, 29 L.R.A. (N.S.) 652.

"We regard said case of Manley v. Scott as in point and as being soundly reasoned.

Board of Election Commissioners

The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs. To illustrate:

"In Walker v. Linn County, 72 Mo. 650, the county court, through an appointed agent, insured county property for a period of five years. Point was made, on demurrer, that the court had no power to make the contract. This court held that the county court, under its statutory authority to 'have the control and management' of the county's property and its statutory duty to 'take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage,' had the implied authority to insure the buildings belonging to the county. The contract was held valid. The question of the time of performance as extending beyond the terms of office of the then members of the court was not raised and was not discussed in the opinion, and that case therefore can hardly be considered authority one way or the other on the point we now have under consideration. But, if thought of at all, the time factor must have been regarded by the court as not affecting the validity of the contract. And, whether considered or not in that case,

Board of Election Commissioners

can it be doubted that the county court, empowered to insure the county property, could lawfully make a contract for insurance extending beyond the terms of office of its then members, if such contract was made in good faith and was (perhaps because of a lower annual premium than for a short period) advantageous to the county? We think not. Other illustrations might be given. In our opinion, a county court has power to make a contract such as that here in question, for a reasonable time, the performance of which will extend beyond the term of office of some member or members of the court. We so hold.

"We take next the contention that the contract was for an unreasonable time and was made in bad faith and collusively. As to the time factor we think it clear that one year cannot be considered an unreasonable term of employment, the circumstances considered. * * *"

The principle laid down in the Aslin case, supra, we believe, to be applicable to the present case because the contract between the Board of Election Commissioners and the Monarch Transfer & Storage Company was not made by the individual members thereof but by the board.

The question of whether or not the contract between the Board of Election Commissioners and the Monarch Transfer & Storage Company was for an unreasonable time is a question to be determined from the attendant facts and circumstances which existed at the time such contract was entered into. We, of course, have no information as to whether or not this particular contract is an advantageous one. The question of whether or not this four year contract is one for a reasonable time, therefore, is one as to which we can express no opinion.

CONCLUSION

It is the opinion of this department that a contract for storage and delivery of election supplies entered into by the Board of Election

Board of Election Commissioners

Commissioners of Kansas City, Missouri, and the Monarch Transfer & Storage Company on December 7, 1949, for a term beginning January 12, 1949, and ending December 31, 1952, is not invalid because of the fact that such contract was to be in effect for a period of nearly four years after the expiration of the terms of office of the election commissioners who entered into the contract. A determination as to the attendant facts and circumstances which prevailed when the contract was entered into is necessary in order to determine whether or not such contract was for a reasonable time.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVAL:

J. E. TAYLOR
Attorney General

TAXATION

) Personal property may not be taxed to merchant for both
) merchants' tax and personal property tax.

April 4, 1950

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Where an assessment is made on a merchant for merchant's tax and another assessment is made on the same property as a personal tax, would it be considered double taxation and unlawful?

"The property is being assessed to the merchant both for the merchant's tax and for the personal property tax."

Section 11305, Laws of Missouri, 1945, page 1838, provides:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Honorable Joe Collins

Section 6 of an act found in Laws of Missouri, 1945, page 1799, provides:

"For the purpose of state, county and municipal taxes merchandise held by merchants and the raw material, merchandise, finished products, tools, machinery and appliances used or kept on hand by manufacturers shall constitute a class separate and distinct by itself."

Section 10 of an act found in Laws of Missouri, 1945, page 1782, and relating to the assessment of property, provides in part:

" * * * He (the assessor) shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation. * * *"

(Underscoring ours.)

In the case of State ex rel. v. Alt, 224 Mo. 493, 123 S.W. 882, the court said at 224 Mo. 507:

" * * * In this State merchandise is not listed for taxation as other personal property, but instead the merchant must apply for a license to trade as such, and without which he subjects himself to a forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. It is, however, provided that merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of goods, wares and merchandise which they may have in their possession at any time between

Honorable Joe Collins

the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a sworn statement of the merchant, that forms the basis upon which the various state, county, school and municipal taxes are levied."

(Underscoring ours.)

If the property which is the subject of your inquiry was a part of the merchant's stock of goods on January first of the taxable year, any attempt under the foregoing statutes to assess such property to the merchant as other personal property would be without authority of law, and, therefore, the assessment would be void without regard to the question of double taxation.

There might conceivably be a situation where a merchant had property on January first which was not part of his stock of merchandise and subsequently decided to place it in his stock for sale some time between the first Monday in January and the first Monday in April and it was a part of such stock at the time that the inventory was determined for purposes of merchants' tax. In such situation if the property were assessed to the merchant as other personal property by reason of his ownership on January first and was also included in computing his merchants' tax, the question of double taxation would arise.

Double taxation is not expressly prohibited by any constitutional provision. However, the courts of this state have held that double taxation violates the uniformity provision of the State Constitution, (Section 3, Article X, Constitution of 1945.) and occurs "when a given subject of taxation contributes twice to the same burden, while other subjects of the same class are required to contribute but once." (State v. Hallenberg-Wagner Motor Company, 341 Mo. 771, 108 S.W. (2d) 398, 1. c. 402.)

The merchants' tax has been held to be a property tax and not an excise tax on the privilege of doing business and measured by the value of the stock of goods of the merchant. (American Manufacturing Company v. City of St. Louis, 270 Mo. 40, 192 S. W. 402.)

Such being the nature of the tax, we feel that to assess the property to the merchant both as personal property for purposes of the personal property tax and as part of his stock of goods in computing liability for merchants' tax would constitute illegal double taxation under the rule laid down by the courts of this state.

Honorable Joe Collins

CONCLUSION

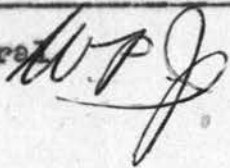
Therefore, it is the opinion of this department that a merchant may not be charged with both personal property tax and merchants' tax on the same item or items of personal property.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General



RRW/feh

JURIES) Jurors in Probate Courts entitled to receive \$1.00
PROBATE) per day for their services.
COURTS)

April 6, 1950

4/7/50

Honorable E. W. Collinson
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The question has arisen as to whether or not there is any possible way that a juror in Probate Court may obtain \$3.00 a day for services?"

"Compensation for service as a juror is not a common law right, but is purely statutory, and in the absence of statute compensation cannot be recovered; and it is competent for the legislature to require such services and to provide expressly that no compensation shall be allowed." (50 C.J.S. Juries, Sec. 207, p. 943.)

We find no provision expressly providing that probate court jurors shall receive \$3.00 per day for their services.

Article 1, Chapter 5, R. S. Missouri, 1939, provides for the compensation of grand and petit jurors. Section 714 of said article provides:

"Each grand and petit juror on the regular panel shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the courthouse and returning to the same, to be paid out of the county treasury."

Section 724 of said article provides a per diem of \$3.00 for petit jurors not on the regular panel.

There is no provision in Article 1 of Chapter 5 making the compensation therein provided payable to jurors in the probate courts. We find no provision in either Chapter 1, R. S. Missouri, 1939,

Honorable E. W. Collinson

dealing with the administration of estates, or Article 11 of Chapter 10, dealing with organization of the probate courts, which makes the provisions of Article 1, Chapter 5, applicable in the matter of compensation of probate court jurors.

The only provision which we find and which is applicable in determining the compensation of probate court jurors is Section 13419, R. S. Missouri, 1939. That section provides, in part, as follows:

"Jurors shall be allowed fees for their services as follows:

* * * * *

"For each person summoned, attending and reporting to any court of record, per day, except as otherwise provided by law. 1.00
For each mile traveled in going to and returning from the place of trial, in attending any trial before a court of record, per mile05

"All fees allowed jurors as above shall be taxed as costs in the cases, respectively, in which they were summoned; but juries serving in more than one case on the same day, at the same place, shall only be allowed fees in one case; and any juror, who shall claim fees for attending in two or more cases, on the same day, at the same place, shall not be allowed fees for that day."

Probate courts are courts of record. Section 17, Article V, Constitution of 1945. There being no provision otherwise for the compensation of jurors in such courts, section 13419 governs.

CONCLUSION

Therefore, this department is of the opinion that jurors in probate courts are not entitled to receive the sum of three dollars per day for their services, but may receive only one dollar per day and five cents per mile, in accordance with Section 13419, R. S. Missouri, 1939.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW/feh

ELECTIONS: Declaration of candidate which does not state office for which filing is made is insufficient and does not authorize printing of candidate's name on ballot.

May 25, 1950

Honorable Joe Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Enclosed is a copy of a declaration filed by a candidate in Cedar County, Missouri.

"The facts given to me are that B. A. Cheek, who is the Chairman of the Cedar County Democrat Central Committee came in the County Clerk's office to file as a candidate for re-election.

"He said in the presence of the County Clerk and his deputy, 'Here, I want to file for re-election for democrat committeeman of Madison Township.' He had signed the form and ask the County Clerk to fill it out for him.

"The County Clerk filled out the declaration, but neglected to put in the Township or what office the candidate was seeking re-election.

"And further as to the candidates intentions to run for re-election for committeeman he did not produce a treasurer's receipt signed by the Treasurer of the committee as would be required if he were a candidate for any other office at the time.

"J. W. Farmer who is running for committeeman of Benton County is orally protesting the declaration and the right of the candidate to have his name printed upon the official ballot at the primary election

Honorable Joe Collins

and that he has not legally filed and that it is now too late to file.

"The county clerk has been ask not to turn in the name of the candidate so his name can be printed upon the official ballot.

"Please give me your opinion on whether or not the candidate is legally filed for the office of democrat committeeman of Madison Township and should the county clerk turn in his name to be printed on the official ballot."

The declaration, a copy of which you have enclosed, provides as follows:

"DECLARATION OF CANDIDATE

Filed
February 4, 1950
Cecil H. Graves
County Clerk
Cedar County

"To County Clerk of Cedar Co.

Stockton, Mo.

"I, the undersigned, being a qualified elector of the Democrat Party, a resident of Cedar County, Missouri, and over the age of 21 years, do hereby declare myself a candidate upon the Democrat ticket for the office of

to be voted for at the General Primary Election to be held on the First Tuesday of August, 1950; and I further declare that if nominated at said primary and elected, I will accept and qualify as such officer.

B. A. Cheek
(Sign name in full)"

Section 11550, Laws of Missouri, 1944, Extra Session, page 24, provides in part as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding

Honorable Joe Collins

such primary filed a written declaration, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: * * "

(Underscoring ours.)

We believe that the written declaration of the candidate for any office must state the office for which the person declaring is a candidate, and it is insufficient merely to make an oral statement to such effect. In the case of Rousseau v. Democratic Parish Executive Committee for Parish of St. Martin, 164 So. 175, the Court of Appeal of Louisiana, First Circuit, had before it a case in which certain persons had filed for ward offices in the parish and had not indicated which ward office was being sought. The court said, l.c. 181:

"The candidacy of Homer Champagne and his coplaintiffs, thirteen in number, were rejected by the committee and the committee rejection was upheld by the lower court on the ground that their notification does not state any office for which they are a candidate nor the ward of which they are an elector. The judge a quo refers to the law under which the parishes are subdivided into wards and these wards, under police jury ordinances, into precincts for the purpose of voting. The lower court took cognizance of the fact that the parish of St. Martin is divided into six police jury wards, from which one police juror, one member of the school board, one justice of the peace, and one constable from each ward is elected in that parish. The action of the committee was upheld in the lower court on the ground on which he acted in holding that a notification as such, in order to satisfy the law, must state the ward and the precinct from which the particular police juror, school board member, justice of the peace, and constable offers as a candidate. And if it does not, there is, in effect, no notification or candidacy which the Democratic parish executive committee could recognize."

Honorable Joe Collins

The court further said, l.c. 182:

"The above language shows unmistakably that the lower court, acting on the face of the notification, upheld the action of the committee on the sole ground that the contestants did not state in their respective notifications the particular ward in the parish in which they sought to offer themselves as a candidate. That the office mentioned in the notification, to wit, 'police jury of St. Martin Parish,' 'parish school board member of St. Martin Parish,' 'justice of the peace of St. Martin Parish,' 'constable of St. Martin Parish,' was no office; that the notification was therefore not such as the committee or the courts could recognize under the Primary Election Law. The opinion does not deny that if the accompanying declaration under oath may be taken into account, the notification is sufficient, but contends that this cannot be done. We differ with the lower court on this subject. We think the accompanying declaration can and should be taken into account in acting on the sufficiency of the notification. The declarations under oath not only state the ward of the parish in which the candidate is an elector, but all except those of Elus Daigle, Lionel Broussard, Luke Courville, Henry F. Roberthon, and Ulinore Guidry state in addition the precinct at which they vote. This declaration under oath is, by the law, made a necessary part of the notification. Without this declaration there is no notification. As notification without this accompanying declaration would be no notification, we believe that when the ward of which the elector is a voter is set forth and contained in the declaration under oath, this declaration under oath must be taken into account in acting on the notification, because under the law, one is an essential accompaniment of the other. The declaration informed the committee of all that they were required to know under the statute in order to certify the candidacy of the party and properly allocate him as a candidate for office from that particular ward. * * * "

Honorable Joe Collins

(Application for writs of certiorari, prohibition and mandamus was denied by the Supreme Court of Louisiana, 165 So. 166.)

The holding in this case is that the office for which candidacy is being declared must appear in the papers filed in declaring such candidacy. We believe the rule laid down in the Rousseau case to be applicable here, and since no written declaration for any office has been filed by Mr. Cheek, his name should not appear on the ballot as a candidate for Democratic Committeeman of Madison Township.

CONCLUSION

It is the opinion of this department that where a declaration of candidacy is filed but the office is left blank that such declaration is ineffective and the name of the person filing such declaration should not be printed on the ballot for committeeman.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

CBB:VLM:LRT

SPECIAL ROAD DISTRICTS: A special road district organized under the provisions of Article XI, Section 8711, cannot extend its boundaries there being no statutory provision therefor. RS 9m
193

June 27, 1950

Honorable Richard Collins
Prosecuting Attorney
Polk County
Bolivar, Missouri



Dear Mr. Collins:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"Articles ten and eleven, Chapter 46, Revised Statutes 1939, provide for the formation of special road districts. Section 8708 of Article 10 provides how boundaries of special road districts already formed under Article 10 may be extended. There is no section in Article 11 providing how boundaries of special road districts already formed under Article 11 may be extended. Section 8731 of Section 11 provides how several road districts already formed under Section 11 can be dissolved; section 8711 of Section 11 provides how special road districts can be formed.

"I request an opinion on the following question:
Can the boundaries of a special road district formed under Article eleven be extended in any way other than by first being dissolved and then reformed with extended boundaries?"

We have examined Articles X and XI, R.S.A. Mo. 1939, and more specifically the sections referred to by you and find that as indicated by you, while there is a statutory provision providing procedure for the extension of boundaries of special road districts organized under Article X, there is no corresponding provision for the extension of the boundaries of special road districts organized under the provisions of Article XI.

Hon. Richard Collins

It is our opinion that since a special road district is purely a creature of the statute it has only such powers as are specifically conferred by statute and that there being no statutory provision for extension of the boundaries of a special road district organized under Article XI, such a district cannot extend its boundaries. As suggested by you the special road districts of which certain portions of the land embodied in the proposed enlarged district constitute a part might be dissolved pursuant to the provisions of Section 8731, Article XI, R.S.A. Mo. 1939, after which dissolution a new district could be formed under the provisions of Section 8711, Article XI, R.S.A. Mo. 1939.

CONCLUSION


We are accordingly of the opinion that there is no way that the boundaries of an existing special road district organized under the provisions of Article XI, Chapter 46, R.S.A. Mo. 1939, may be extended but that a new district may be formed after the dissolution of the districts which territorially constitute parts of the proposed new district.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

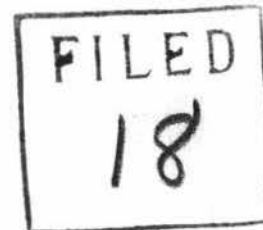
SMW:mw

APPROVED:


J.E. TAYLOR
Attorney General

ELECTIONS } Petitions for amendment of city charter of Kansas City
PETITIONS } should be verified by Board of Election Commissioners
and certified to city council.

July 6, 1950



Board of Election Commissioners
County Court House
Kansas City 6, Missouri

Gentlemen:

We have received your request for an opinion of this department, which request is as follows:

"On Wednesday, June 21st, there was filed with the Board of Election Commissioners 1525 petitions, the form which is attached hereto, pertaining to the move to change the boundaries of Kansas City, Missouri, to exclude the recently annexed area in Clay County, Missouri. The petitions contained what purport to be the signatures of 32,012 registered qualified electors of Kansas City, Missouri. As of 4:30 p.m. June 21st, there were 212,713 registered qualified electors in Kansas City, Missouri.

"The Board of Election Commissioners, before acting, would like to have an opinion on what the duties of the Board of Election Commissioners are and what the procedure should be in regard to the disposition of these petitions. More specifically, the Board wishes to be advised as to whether or not it is their duty to verify the signatures on the petitions and, if the signatures are to be verified, to what official or officials should the petitions be certified.

"We have been unable to discover any constitutional provisions, statutory enactment or any section in the City's Charter or ordinances which set forth the procedure in regard to the

Board of Election Commissioners

handling of these petitions.

"The petitions purport to act on the authority of Section 20 of Article 6 of the 1945 Missouri Constitution. The recent case of State vs. North Kansas City, 228 S.W. (2d) 762, says that any change in the boundaries in the city by the voters amounts to an amendment of the city charter. Section 487 of the Charter of Kansas City, Missouri, provides:

"This Charter may be amended in the method provided by the Constitution of the State of Missouri, as such Constitution now exists, or may hereafter be amended."

"Section 2 of House Bill 804, approved March 6, 1946, provides:

"Notices of any election provided in said Sections 19 and 20 of Article 6 of the Constitution of Missouri for any amendments thereof, may be given and the form of ballot and details of such election determined, by the Board of the election commissioners or other officials having charge of municipal elections in said cities in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended."

"Section 7619, Mo. R.S. 1939, provides for a special registration upon submission of the charter to the voters. The Board would also like an opinion as to whether or not this section applies to a charter amendment if it is determined that this proposed change of city boundaries amounts to an amendment of the city charter.

"The Board would like also to know if the responsibility for the expenses relative to handling these petitions is the city's or the city and counties combined. The board would like to have an answer as soon as possible."

Board of Election Commissioners

The petitions are headed as follows:

"Petition for Amendment of the Charter of Kansas City, Missouri, so as to Reduce its Area and Corporate Limits by Excluding Therefrom that Part in Clay County, Missouri, and for an Election Thereon as Provided by Section 20 of Article VI of the 1945 Missouri Constitution."

The petitions propose the enactment of a new Section 4 of Article 1 of the Kansas City Charter, which section defines the corporate limits of the City of Kansas City.

Section 20 of Article VI of the Constitution of Missouri, 1945, provides as follows:

"Amendments of any city charter adopted under the foregoing provisions may be submitted to the electors by a commission as provided for a complete charter. Amendments may also be proposed by the legislative body of the city or by petition of not less than ten per cent of the registered qualified electors of the city, filed with the body or official having charge of the city elections, setting forth the proposed amendment. The legislative body shall at once provide, by ordinance, that any amendment so proposed shall be submitted to the electors at the next election held in the city not less than sixty days after its passage, or at a special election held as provided for a charter. Any amendment approved by a majority of the qualified electors voting thereon, shall become a part of the charter at the time and under the conditions fixed in the amendment; and sections or articles may be submitted separately or in the alternative and determined as provided for a complete charter."

The only statutory provision expressly implementing this constitutional provision which we find is that quoted in your letter as Section 2 of House Bill No. 804, approved March 6, 1946, and which is found in Laws of Missouri, 1945, at page 1309.

Board of Election Commissioners

Under Section 12097, R. S. Missouri, 1939, as amended by House Bill No. 2055 of the Sixty-fifth General Assembly, the Board of Election Commissioners has charge of "all elections, general, special, local, municipal, state, county, all primaries and of all other of every description to be held in such city, or any part thereof, at any time."

The petitions state that they propose an amendment to the charter of the City of Kansas City and on their face they purport to do so. Therefore, in determining the duties of the Board of Election Commissioners in connection with the handling of these petitions, we feel that the Board should consider them to be petitions for the amendment of the charter of the City of Kansas City, Missouri.

The constitutional provision quoted above requires petitions for the amendment of a city charter to be filed with the body or official having charge of the city elections. As above set out, Section 12097 makes the Board of Election Commissioners the body having charge of elections in the City of Kansas City. As such, it has possession of the registration lists and would appear to be the logical body to check and verify the petitions filed with it. Although there is no statute expressly so providing, we feel that in view of the constitutional provisions, the checking of the petitions should be handled by the Board of Election Commissioners. We feel that the petitions should be verified prior to the calling of any election in order to ascertain that they comply with the requirements of Article VI of Section 20 insofar as the required number of signatures is concerned.

Section 20 of Article VI requires the legislative body of the city to provide by ordinance for the submission of the proposed amendment to the vote of the city. In the City of Kansas City the council is the legislative body, and inasmuch as the constitution imposes upon the council the duty of calling the election, we feel that the Board of Election Commissioners should certify the petitions to the city council.

As for your inquiry concerning Section 7619, R. S. Missouri, 1939, that section was repealed by House Bill No. 2058 of the Sixty-fifth General Assembly. That bill repealed Sections 7601 to 7625, inclusive, R. S. Missouri, 1939, and therefore no reference is now required to those provisions in the election on the proposed amendment to the city charter.

As to the matter of the expense of handling the petitions, we perceive no theory under which the costs could be borne by the

Board of Election Commissioners

county. The matter concerns a purely municipal matter and, therefore, the costs must, we feel, be borne by the city.

CONCLUSION

Therefore, it is the opinion of this department that the Board of Election Commissioners of Kansas City should verify the signatures on petitions presented to it proposing the adoption of an amendment to the charter of the City of Kansas City, and if the petitions contained the required number of signatures, certify said petitions to the city council for the calling of an election. The costs of handling said petitions must be borne by the city. Section 7619, R. S. Missouri, 1939, having been repealed by House Bill No. 2058 of the Sixty-fifth General Assembly, the provisions of that section need no longer be considered.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SHERIFF:

Sheriff is to convey county patient found insane to state hospital upon order of probate court. Rate of compensation fixed by R. S. Mo. 1939, Sec. 9355. No duty to convey pay patient admitted to state hospital through application to superintendent unless the sheriff has the patient in his care and custody for some other cause.

August 10, 1950.

FILED: 18

Hon. E. Wayne Collinson,
Prosecuting Attorney
Greene County,
Springfield, Missouri.



Dear Mr. Collinson:

This office is in receipt of your recent letter requesting an opinion from this department on the following problem.

"The following set of circumstances has happened in Probate Court here in Greene County:

"The Sheriff took two incompetent persons to Nevada, Missouri to be incarcerated in the insane asylum. He took them both at one time with one guard. One of these persons is a pay patient, the other person is a county patient. The question has arisen and is in dispute between the Sheriff and Probate Judge as to whether both of these persons should be charged for mileage, guard, and if both should not be charged, how should it be shown on the Probate Judge's books and Sheriff's books."

Your attention is directed to Laws of Mo. 1945, p. 905, Sec. 1, referring to county patients who have been found by the Probate Court to be insane, and a fit subject to be sent to a state hospital. Said section reads in part as follows:

"If after such examination, the court, or the jury, if one shall have been employed, shall be satisfied of the truth of the facts set forth in the statement, the court shall cause a suitable order to be entered of record, upon its own decision, or, where the verdict of the jury has been rendered, upon the verdict. And such order shall further set forth that the person found to be insane is a fit subject to be sent to a state hospital (naming the particular hospital) to undergo treatment therein; * * thereupon the Clerk or Judge of the Court shall forthwith issue a certified copy of the court's order and commitment, and deliver the same to the officer or person who

who is to transmit such patient to such hospital. The Clerk or Judge shall, thereupon, in due season, for conveyance of such person to the state hospital by the appointed time, issue his warrant to the sheriff of his county, or any other suitable person, commanding him forthwith to arrest such insane person and convey him to the state hospital designated in the order. If the Clerk or Judge be satisfied of its necessity, he may authorize one or more assistants to be employed * * *."

R. S. Mo. 1939, Sec. 9355, provides for the rate of compensation for a sheriff and his assistant for removing county patients to or from a state hospital in the following words:

"To the Sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and \$1.00 per day for the support of each patient on his way to or from the hospital shall be allowed; to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting under the warrant of the clerk, \$4.00 per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled: Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasury of the proper county."

These two sections appear to clearly impose upon the sheriff or other suitable person named by the probate court the duty to convey a patient to a state hospital designated in the order, and further clearly states the mileage charge and per diem to be allowed the sheriff and his assistant to be paid out of the county treasury for conveying a county patient to a state institution.

Your second inquiry is whether the sheriff should be allowed a fee for transporting a "pay patient" to the state hospital.

First, you will note the manner in which pay patients, or those not sent to the hospital by order of the probate court, are to be admitted to the hospital. Admission of pay patients to the state hospitals is provided for in sections 9323 to 9327, R.S. Mo.

1939. Application for the admission of such a patient is made to the superintendent of the hospital and the probate court has no duties whatever in connection with committing a pay patient. It is the duty of the person by whose direction the patient is sent to the hospital to deliver such patient to the hospital. We find no statutes imposing upon the sheriff the obligation to take into his care and custody any person to be conveyed to a state hospital unless the patient is dangerous in the community or has been charged with or convicted of a crime or has escaped from a state hospital. You do not indicate in your request for an opinion that such circumstance has arisen here.

We do not find any statute which requires the sheriff to convey a pay patient to the state hospital except under the circumstances cited above. If the person by whose direction application is made to the superintendent of the hospital for the admission of a pay patient fails to convey such patient to a hospital and employs another person to perform that task the person so employed, whether the sheriff or any other person, shall determine the amount of the charge for such service as an independent agreement between such persons. It is not a charge or fee coming to the sheriff by virtue of his office, and no statute established the rate the sheriff or any other person employed to convey a pay patient to a state hospital shall charge. The sheriff or other person so employed would not report such employment or services or charges therefore to the probate court, nor to the county court because it is in the nature of private employment rather than a duty of his office.

Of course, if there were some extenuating circumstance such as the patient being in the custody of the sheriff because of a criminal conviction or because he has escaped from a state institution then the sheriff would be obligated to convey such patient to the hospital. You do not disclose such a circumstance has arisen in the problem cited by you, and we have assumed in rendering this opinion that your case is one in which some person has requested the superintendent of a state hospital to admit a pay patient and that neither the probate court nor the sheriff have any official connection with such admission by virtue of their office.

If the condition of the pay patient is such as to authorize his or her confinement for his or her safety and the safety of persons and property of others, then the probate court could order the pay patient confined, at least temporarily. Such temporary confinement could be within a state hospital with the transportation to be made by such person or persons as may be designated by the probate court, and the expense of such transportation charged to the estate of the pay patient in probate court as part of the costs on the hearing of the sanity of the pay patient. You do not indicate in your letter that this was the situation, however.

CONCLUSION.

It is the duty of the sheriff or other person named in the order of the probate court to convey a county patient to a state hospital for the insane. The clerk or judge of the probate court may authorize one or more assistants to be employed. The sheriff or other person and the assistant shall be allowed the sums specified in R. S. Mo. 1939, Sec. 9355, for conveying a patient to a state hospital who has been committed as a county patient by the probate court.

No statute charges the sheriff with the duty of conveying a patient to a state hospital by virtue of his office nor fixes any fee therefor unless the sheriff shall for some other cause have the patient in his care or custody, such as a patient found to be dangerous in the community, or one who has been charged with or convicted of a crime or has escaped from a state hospital. It is the duty of the person requesting admission of the pay patient to the state hospital to convey such patient to the hospital. If such person employs the sheriff or any other person to transport a patient to the state hospital the charges made for such services must be by agreement between the parties; the statutes fix no charge payable to the sheriff by virtue of his office, unless the sheriff shall for some other cause have such patient in his care or custody as indicated above. The fee or charge collected for transporting a pay patient to a state institution admitted on application to the superintendent of the institution should not be reported to the probate court. If the condition of the pay patient warrants temporary confinement to safeguard the insane person and the person and property of others, then the probate court could order temporary confinement and transportation expenses would be charged to the estate of the pay patient in probate court as part of the costs on the hearing of the sanity of the pay patient.

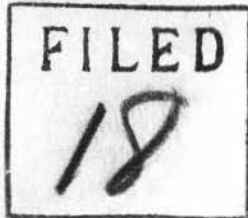
Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

LOTTERY: Such an enterprise contains three elements: consideration, chance and prize, and, therefore, is a lottery.



November 22, 1950

11/28/50

Board of Police Commissioners
Kansas City 6, Missouri

Attention: Mr. Jack K. Ellis, Secretary

Gentlemen:

This will acknowledge receipt of your request for an official opinion which reads:

"A questionable practice concerning coin operated machines in licensed liquor establishments has recently developed in Kansas City. Tavern patrons attaining a certain score on the machines become eligible for a prize or prizes awarded after a certain period as a result of a drawing held in the establishment.

"The Police Department, after receiving several complaints, requested opinions from the City Counselor's office and the Director of Liquor Control concerning the legality of such a practice. Enclosed is a copy of an opinion by Henry Arthur, an Assistant City Counselor, directed to Mr. Fred R. Johnson, Director of Liquor Control of Kansas City, Missouri, under date of November 9, 1950. The Board of Police Commissioners respectfully requests your advice on the opinion in order to ascertain if the practice conflicts in any way with the state law."

The law is well established in this state that it is illegal to operate a lottery. However, sometimes it becomes difficult to determine just what constitutes a lottery.

Section 39, Article III of the Constitution of Missouri, 1945, is a specific prohibition against the General Assembly passing any law legalizing a lottery. It reads in part:

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"The general assembly shall not have power:

* * * * *

"(9) Authorization of Lotteries or Gift Enterprises. -- To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; (Sec. 10, Art. XIV, Const. of 1875)"

The General Assembly, implementing the foregoing mandate of the people, enacted Section 4704, Mo. R.S.A., which reads:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

It is well established in this state that the elements of a lottery are (1) consideration, (2) prize and (3) chance. In State ex inf. McKittrick v. Globe Democrat Publishing Company, 341 Mo. 862, 110 S.W. (2d) 705, 1.c. 713, the court said:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. * * * "

See also State v. Emerson, 318 Mo. 633, 1 S.W. (2d) 109, 1.c. 111, Point 3.

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Therefore, in view of the foregoing decisions, it is necessary that all three elements hereinabove enumerated be present in any single enterprise for it to be declared a lottery. The absence of any one element will take it out of that classification.

We have read the enclosed copy of an opinion rendered by the City Counselor of Kansas City, Missouri, wherein after discussing the common lottery of purchasing a ticket with a number thereon and thereafter a drawing is held and the one holding the lucky number wins a prize and stating that is all the purchaser gets, the ticket and a chance, he states: "The procedure which you describe in your letter apparently differs from a common lottery for the reason that a purchaser placing his coin in an amusement machine at least buys the pleasure of playing the machine and secures relaxation or amusement by so doing." He then concludes: "The mere fact that the winner is determined by chance would not in our opinion make this enterprise a lottery."

If the only element involved in this enterprise were chance, we would agree with the conclusion reached by the City Counselor. However, as we read your request, there are two other elements included in said enterprise making a total of three elements, which is all the law requires under the foregoing decisions of the Supreme Court of this state to constitute a lottery, and, therefore, we regret to have to disagree with the opinion of the City Counselor. We must hold that such an enterprise does constitute a lottery.

An analogous enterprise to the one herein under consideration is where one attends the picture show on bank night. All he purchases is a ticket at the regular price to enjoy the feature picture and he sees the show. However, by so doing, he also is entitled to a chance to win a prize in addition to seeing said show. This is commonly referred to as bank night at the picture show. The courts have repeatedly held that the payment for said ticket to see the show constitutes a consideration and, along with chance and prize which cannot be denied in such an enterprise, makes it a lottery. In State v. McEwan, 343 Mo. 213, 120 S.W. (2d) 1098, 1.c. 1100, the court, in holding that bank night is a lottery, said:

" * * * Courts have uniformly held that the scheme of 'bank night' is a lottery when the participants therein are limited to those purchasing tickets to the theater. Respondent concedes that to be the law. * * "

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In the case of *State v. Emerson*, supra, the Supreme Court had before it a scheme or a device whereby a furniture company sold contracts for \$55.00 each to be paid on equal installments of \$1.00. Each week a drawing was held and the holder of a winning number received \$55.00 worth of furniture without further payment. The persons who did not win any of the drawings still received \$55.00 worth of furniture in payment of a like amount. The court held that the payment of the weekly installments was consideration even though the person in winning in the weekly drawing received a full value for the money paid in. In the instant case, the party purchases for a nickel a right to play a game for a high score and he also has the pleasure of playing and operating said machine. However, as in the case just cited, he is likewise entitled to a drawing and, if lucky, a prize.

Also see *Featherstone v. Independent Service Station Association*, (Texas Civil Appeals) 10 S.W. (2d) 124; *Retail Section of Chamber of Commerce v. Kieck*, 128 Neb. 13, 257 N.W. 493; *People v. Bloom*, 227 N.Y. Sup. 225, (reversed on other grounds), 248 N.Y. 582, 162 N.E. 533.

In view of the foregoing constitutional and statutory prohibitions in this state against operating lotteries, namely, Section 39, Article III, Constitution of Missouri, 1945, and Section 4704, Mo. R.S.A., and the decisions quoted defining a lottery, it is apparent in this instance that the purchaser, in dropping a nickel in the machine, is not only the beneficiary of the pleasure of operating said machine, but likewise the beneficiary of the holder of a chance on a prize. This constitutes a consideration and the drawing to be held clearly constitutes a chance, and it is undisputed as to there being a prize for the lucky holder of the number drawn, so this enterprise definitely contains all three elements--consideration, chance, and last but not least, a prize.

CONCLUSION

Therefore, it is the opinion of this department that such an enterprise contains all three elements of a lottery as heretofore defined by the courts of this state, namely,


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consideration, chance and prize, and anyone operating such an enterprise directly violates Section 39, Article III of the Constitution of Missouri, 1945, and Section 4704, Mo. R.S.A., and is subject to prosecution for a felony.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARH:VLM

OFFICERS) Payment to incumbent ^{county judge} who holds over under action brought
by himself in circuit court relieves county of liability
for further payment after Supreme Court holds incumbent
not entitled to office.

December 14, 1950

12-19-50

FILED

18

Honorable E. W. Collinson
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The following question has arisen in this office in relation to the following set of facts:

"In the election of 1948, A. W. Chilcutt was elected Judge of the Second District of the County Court of Greene County, Missouri. At a later time, there was a suit filed in which Judge Chilcutt was kept from being seated as Judge and Judge Denny Pickel continued to draw his pay even though he had not been elected. Judge Chilcutt was kept out of office for five months and three days for which he did not get paid.

"In the case of State ex rel. Chilcutt v. Thatch 221 S.W. (2) 172, it was decided that Judge Chilcutt had the right to hold this seat and that Judge Pickel never had any such right. Judge Chilcutt has never been paid for the time which he was kept out of office, and the question now is whether or not the County Court of Greene County can pay him for that salary which is due him. It appears that a judgment against Pickel is no good and Judge Chilcutt

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will never collect the unpaid salary unless paid by the County Court."

Examination of the opinion of the Supreme Court in the case of State ex rel. v. Thatch, referred to in your opinion request, reveals that Judge Pickel on November 23, 1948, after Judge Chilcutt had received the larger number of votes at the November election filed an action for declaratory judgment against Chilcutt and the county clerk praying for an injunction prohibiting the issuance of a certificate of election to Chilcutt on the ground that Chilcutt's nomination had not been in accordance with law. The trial court issued a temporary injunction enjoining the county clerk from certifying Chilcutt's name as the person elected. The Supreme Court held that the circuit court had no jurisdiction to enter any order enjoining the issuance of the certificate of election and dissolved the injunction. The court held that any objection to Judge Chilcutt's nomination must have been taken in accordance with Section 11599, Missouri R.S.A., and that in the absence of any action under said section no action could be maintained in the circuit court.

In the case of State ex rel. Gallagher v. Kansas City, 319 Mo. 705, 7 S.W. (2d) 357, the Missouri Supreme Court adopted the majority rule in this country to the effect that payment to a de facto officer is a defense to an action brought against the governmental agency paying the salary by a de jure officer who has been held entitled to the office. In that case the Missouri Supreme Court stated at 7 S.W. (2d) 1. c. 366:

" * * * The overwhelming weight of authority elsewhere is to the effect that payment of salary, or fees, to a de facto officer, holding under color of title, discharges the municipality from further liability for the money so paid, when suit is brought by the de jure officer. We have read every opinion on both sides of this question (a long and tedious work), and have no hesitancy in saying that such rule has support of all the well-reasoned cases. The rule is well grounded, not only on the great number

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of cases asserting it, but on the reasons assigned. Relator cannot recover the salary sought in this case under this rule."

Missouri cases have likewise held that persons holding over after the expiration of their terms pursuant to a constitutional provision such as that found in Missouri (Article VII, Section 12, Constitution of Missouri, 1945) are de facto officers. (State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 S.W. (2d) 929.) Of course, in the present case Judge Pickel held over by virtue of the injunction issued by the circuit court which the Supreme Court held the circuit court had no authority to issue. However, we find no cases which distinguish between holding over in the absence of qualification of a successor for reasons not within the control of the holder of the office, and cases in which qualification is prevented by action of the holder which was the case here. The circuit court had enjoined the issuance of the certificate of election and under the rule laid down by the Supreme Court in the Gallagher case, supra, we feel that payment to Pickel discharged the obligation of the county.

The Missouri courts have recognized an exception to the rule laid down in the Gallagher case in cases where payment to the de facto officer is not made in good faith. In the case of Luth v. Kansas City, 203 Mo. App. 110, 218 S.W. 901, the Kansas City Court of Appeals held that under the facts of the case payment to the de facto officer had not been made in good faith, and, therefore, the de jure officer was entitled to recover from the city. The court in this case discussed the matter as follows at 218 S.W., 1. c. 902:

"Now did the city act in good faith when it paid the salary to Folk the de facto clerk? Undoubtedly it did not. It is enough to condemn the city that, knowing the question which of the two claimants was the legal one was then pending in the Supreme Court, it undertook, on the 11th of May, 1912, to have the appeal dismissed, and succeeded in doing so; but that court on the 21st of May had its attention called to probable injustice, and reinstated

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the case. Plaintiff notified the city on May 16th that he would file a motion in the Supreme Court to set aside the dismissal, and this motion was in fact filed on May 21st, and the court shortly thereafter decided that plaintiff was the legal claimant. We find that, with this action of the city and plaintiff's objections, it, on the next day after plaintiff filed his application in the Supreme Court, paid Folk the back salary of \$1,185 in a lump sum. * * *

The court concluded at 218 S.W. 1. c. 903:

"When it is said that the city did not act in good faith when it paid Folk, it is not meant that the municipal officers took such action with evil or dishonest intent, but that with knowledge of the situation, as we have explained, after having protected itself by withholding the salary from both claimants, it withdrew that protection by assuming to decide in favor of the wrongful claimant, pending a settlement of the controversy by the court."

Of course, we have no knowledge of the facts of the present matter other than as set out in the report of the case of State ex rel. Chilcutt v. Thatch, supra. Whether or not there was any bad faith involved in the payment to Pickel would be a matter of fact.

CONCLUSION

Therefore, it is the opinion of this department that Greene County by paying salary to Judge Pickel of the Greene County Court is relieved from any obligation to make payment to Judge Chilcutt when Judge Pickel had retained the office by holding over after the expiration of his term by virtue

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of an action which he originated in the circuit court, although the Supreme Court of Missouri subsequently held that Judge Pickel was not entitled to the relief granted in the circuit court, and that Judge Chilcutt was entitled to the office of county judge.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

 J. E. TAYLOR
Attorney General

RRW/feh

FINES: Fines in Seagram Anti-Trust Case go into general revenue.

February 2, 1950



Honorable R. E. Copher
Collector of Revenue
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I am in receipt of a check in the amount of \$42,500.00 from the Clerk of the Supreme Court covering the Fines in the case of the State of Missouri against:

Seagram-Distillers Corporation
All-State Distributors, Inc.
Stickney-Hoelscher Cigar Company and
McKesson and Robbins, Inc.

"I am unable to determine what disposition should be made of these funds; that is, what fund they should be credited to."

The fines mentioned in your opinion request were imposed by the Supreme Court of Missouri in the case of State of Missouri on the information of J. E. Taylor, Attorney General, Relator, v. Seagram-Distillers Corporation, et al., Respondents.

The information filed in this matter contained the following:

"Comes now J. E. Taylor, Attorney General of the State of Missouri, who prosecutes this action in behalf of the State of Missouri and causes the Court to understand and be informed as follows:

"1. This information in the nature of quo warranto is filed and these proceedings instituted as an original action before

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this court under and by virtue of Chapter 43, Article I, Section 8307, Revised Statutes of Missouri, 1939, and charges violations of Sections 8301, 8302 and 8303 of said Chapter 43, Article I, as hereinafter more fully set out."

The Respondents are charged in the information with having entered into a combination to control the price at which Seagram Liquor products are sold in the State of Missouri. The information specifically charged that the respondents "offended against the laws of the State of Missouri and more particularly Sections 8301, 8302 and 8303, R. S. Missouri, 1939, and have thereby wilfully abused and misused their rights, authority, privileges and franchises to the injury of the people." The decree of the court contains the following:

"NOW, THEREFORE, before the taking of any testimony herein and pursuant to a stipulation and agreement among all the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

"1. That respondents, and each of them, are hereby ousted from the practice of so exercising their respective franchises, privileges, rights and licenses bestowing upon them the right to engage in the business of buying and selling intoxicating liquor within the State of Missouri in such a manner as to create or enter into agreements or combinations to regulate, control or fix the resale price at which said intoxicating liquor products are sold at wholesale or retail within the State of Missouri, and from the practice of enforcing said agreements to so regulate, control or fix prices in any manner or means whatsoever.

"2. That the respondent, Seagram-Distillers Corporation, for its violation of the laws of this State, as alleged, be fined in the sum of Thirty-five Thousand (\$35,000.00) Dollars."

Fines are similarly assessed against All-State Distributors, Incorporated, in the amount of Twenty-five Hundred (\$2500.00) Dollars; Stickney-Hoelscher Cigar Company, in the amount of

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Twenty-five Hundred (\$2500.00) Dollars; and McKesson and Robbins, Incorporated, in the amount of Twenty-five Hundred (\$2500.00) Dollars.

The question in the handling of this money arises by reason of the provision of Section 7 of Article IX of the Constitution of Missouri, 1945, that "the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, * * * shall be distributed annually to the schools of the several counties according to law." The Supreme Court recently considered the application of this provision in the case of New Franklin School District v. Bates, et al., No. 41308, decided January 9, 1950. In that case the problem considered was whether or not the constitutional provision, above referred to, controlled the distribution of a fund of \$2,090,000, paid to the Clerk of the Supreme Court by certain insurance companies pursuant to a judgment entered by the Supreme Court in the case of State on inf. Taylor v. American Insurance Company, et al., 355 Mo. 1053, 200 S.W. (2d) 1. In the New Franklin case opinion, the court described the action in which the fines were levied as follows:

"Respondents offered in evidence the pleadings and judgment in the case of State on inf. Taylor v. American Ins. Co., supra, the cause in which the fund was collected. There is no dispute as to the type and kind of action. It was in the nature of quo warranto and the issues presented clearly appear from the opening paragraphs of the opinion of this court. The court found that 'the said respondents, and each of them, did enter into a conspiracy to cheat and defraud, their policyholders and the State of Missouri, and did bribe the Superintendent of Insurance of the State of Missouri to compromise and settle certain litigation effecting insurance rates in Missouri, and to recover certain impounded funds in rate litigation and to approve a new schedule of insurance rates, all as charged in the information filed; (and) that said acts of the respondents as set out constitute an abuse and misuse of their corporate franchises to do business in this State.' It was considered and adjudged by the court that each of the respondents 'for such abuse and misuse of its corporate franchise' should pay as a penalty

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a fine in the sum therein specified.
(200 S.W. (2d) 1, 49 et seq.)

"The action was instituted by the Attorney General by virtue of his office, upon his own information, in the exercise of his common law powers. * * *

"The action was essentially based upon a breach of the implied contract of each of the several respondent corporations with the State. The nature of the action was fully discussed and determined in the opinion of this court and authorities were cited. * * *"
(Underscoring ours.)

The court further stated:

"It is clear we think from the authorities we have cited, supra, that the right of this court to impose the penalties, forfeitures, or fines, which were imposed and collected in the case of State on inf. Taylor v. American Ins. Co., supra, for a breach of the implied contracts of the insurance companies with the state, were not based upon any statutory enactments authorizing the imposition and collection of such fines and penalties. The proceeding was not a statutory action for the assessment and collection of fines and penalties prescribed by law, nor an action to recover a statutory fine or penalty. It was a common law action for the breach of implied contracts with the state. Penalties were assessed, but they were not the penalties provided by any penal laws.

(Underscoring ours.)

The court concluded as follows:

"We hold that the words 'penal laws of the state' as used in Sec. 7 Art. IX of the present Constitution refer to statutory enactments fixing or providing for penalties,

forfeitures and fines and for their assessment and collection. The disposition of the fund in question was not controlled by Sec. 7, Art. IX, supra, if otherwise applicable, because it was not collected for a breach of the 'penal laws' of the state, but was a penalty, forfeiture or fine imposed and collected for the breach of the implied contracts of the several corporations with the state, as ruled in the case of State on inf. Taylor v. American Ins. Co., supra."

(Underscoring ours.)

The nature of actions for enforcement of the Anti-Trust Laws of this state has been discussed on several occasions by the Supreme Court. In the case of State ex inf. v. Standard Oil Company, 218 Mo. 1, at l. c. 347, the following is found: (The court was discussing and quoting from the case of State ex inf. v. Equitable Loan and Investment Company, 142 Mo. 325)

"Continuing, in the discussion of the proposition as to whether or not an information in the nature of a quo warranto could be sustained against a corporation for misuse and abuse of its franchise by reason of its failure to comply with a statute, when the Legislature had prescribed certain penalties to be imposed in other proceedings for such violation, he said:

"And the jurisdiction of this court in this regard being conferred by the Constitution, it is beyond the power of the Legislature to take it away, and it will not be intended that a legislative enactment was designed to take such jurisdiction away, although such enactment should confer another and distinct remedy upon some inferior court or board. * * * In consequence of this well-recognized principle, sections 7 and 8 of the Laws of 1895, pages 31 and 32 in relation to the duties of the supervisor of building and loan associations, to institute proceedings in the circuit court against a delinquent

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building and loan association, and that such proceeding shall be conducted by the Attorney-General, cannot abate the jurisdiction conferred on this court by the Constitution nor deprive the Attorney-General of his common law and inherent powers to file ex-officio informations, as in the present instance.'

"The statute under which the respondent in the case just mentioned was organized and doing business imposed upon it certain penalties for violating such statutes; and also provided that if any such company should violate the provisions of its charter or laws of the State, the supervisor of building and loan associations 'shall institute proceedings in the circuit court of the city or county in which such association has, or had, its principal office, to enjoin or restrain such association from the further prosecution of its business, either temporarily or perpetually, or for such injunction and dissolution of such association and the settling and winding up of its affairs, or for any and all of said remedies combined, as the supervisor may deem necessary.' (R. S. 1899, secs. 1385, 1392, and 1393.)

"It is thus seen that those sections of the statutes are just as full and explicit, in prescribing penalties, forfeitures and remedies for their violation and in designating the court in which those penalties and forfeitures are to be imposed and adjudged, as are the anti-trust laws now under consideration. But, notwithstanding those ample statutory provisions, this court, in that case, held that an information in the nature of quo warranto would lie to oust the respondent therein of its charter rights for violating its charter powers. It was also held therein that this court derived its jurisdiction from the Constitution, and that even though the Legislature had attempted to deprive

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it of that jurisdiction, by express enactment, it could not have done so, for the reason that such a statute would be unconstitutional and void."

(Underscoring ours.)

The court further stated at 218 Mo., 1. c. 352:

"It is thus seen that a corporation can so offend against the laws of the State as to justify the Attorney-General in proceeding against it by information in the nature of quo warranto to forfeit its corporate franchise; and those offenses may be against the common law as well as against the statute laws of the State.

"And it is wholly immaterial, and the corporation cannot justify or defend its conduct in that regard by a plea, that such conduct was a violation of the criminal laws of the State, by which it and its officers and agents are rendered amenable to the penalties and punishments thereof.

"In other words, the laws of the State authorize and direct the Attorney-General to institute civil proceedings by information in the nature of quo warranto against any corporation to annul its charter and forfeit its franchises whenever it has by misuser, nonuser or usurpation of power so conducted itself as to violate the laws of its being or the criminal laws of the State. If, upon trial, the corporation is found guilty, a decree of forfeiture must go, and the court has the power, in addition, to impose penalties for such violations of the laws as it may deem proper. This, however, does not proceed upon the theory that the corporation has been guilty of a crime and that it is being punished therefor; but upon the idea

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that there is an implied or tacit agreement on the part of every corporation, by accepting its charter and corporate franchises, that it will perform its obligations and discharge all its duties to the public, and that by failing to do so it commits an act of forfeiture which may be enforced by the State in the manner before suggested. (State ex inf. v. Delmar Jockey Club, 200 Mo. 1. c. 70.)

"In addition thereto the Legislature has the unquestionable power and authority to declare the acts which will work a forfeiture of the charter shall also constitute a crime, and subject the corporation and its agents and servants to punishment under the criminal laws of the State. * * *

"It must, therefore, follow from what has been said, that this is not a criminal prosecution as contended for by respondents; nor is the procedure provided for in section 8971, Revised Statutes 1899, the exclusive remedy available to the State to correct abuses and usurpation of powers by corporations doing business in this State."

(Underscoring ours.)

In the case of State ex inf. v. Arkansas Lumber Co., 260 Mo. 212, at 1. c. 291, the court stated:

"It would appear then that we have in this State three methods of proceeding against violators of our anti-trust statutes: (a) by indictment or information as for a felony (if the offender be a natural person); (b) by bill in equity to 'prevent and restrain, under section 10303, which, jurisdiction attaching, and proof being made, draws to it the punishments prescribed by section 10304; and (c) actions at common law by informations in the nature of quo warranto, where all defendants are corporations. If we could proceed against and convict for these offenses a natural person by a proceeding in quo warranto, we could not punish him."

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In the present situation the information states that it is brought under and by virtue of Section 8307, R. S. Missouri, 1939. However, it charges that the respondents "wilfully abused and misused their rights, authority, privileges and franchises to the injury of the people." The prayer asks, among other things:

"(2) That the respondents, and each of them severally, be excluded from all corporate rights and privileges under the laws of the State of Missouri, and their franchises, rights, authority, license and certificate to do business under the laws of the State of Missouri be declared forfeited, and that each and all of them be ousted from their several corporate franchises, privileges, license and authority to do business under the laws of this state."

(Compare with the prayer in State ex inf.
v. Standard Oil Company, 218 Mo. 1. c. 43.)

The action was an original proceeding in the Supreme Court. Section 4 of Article V, Constitution of 1945, gives the Supreme Court jurisdiction to "issue and determine original remedial writs." No other original jurisdiction is conferred upon the Supreme Court, and inasmuch as they assumed jurisdiction of the instant matter, that court must have considered the action to have fallen within the third category set out by the court in the Lumber Case, supra.

Such is, we feel, the essential nature of the action here under consideration. The statement in the information that the action is brought under Section 8307, R. S. Missouri, 1939, does not, we feel, change the essential nature of the action from a common law proceeding in the nature of quo warranto to a statutory proceeding.

In the Standard Oil Case, supra, the court pointed out that a statutory provision for proceeding against a corporation cannot abate the jurisdiction conferred on the Supreme Court, nor deprive the Attorney General of his common law and inherent powers to file ex officio informations. The information filed in this case is clearly one filed by the Attorney General ex officio.

Insofar as the nature of the action is concerned, it is identical to that involved in State on inf. Taylor v. American Insurance Company

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et al., supra. Both were common law actions in the nature of quo warranto filed by the Attorney General by virtue of his common law and inherent powers. In the Standard Oil Case the court clearly held that an action for violation of the Anti-Trust Laws, such as is herein involved, is a common law action in the nature of quo warranto. In the New Franklin Case, supra, the court described the action in the Insurance Case as of the same nature. The court in the New Franklin Case relied strongly upon the decision in the Standard Oil Case in determining the nature of the action. The nature of the action here involved, and that involved in the Insurance Company Case, being the same, the decision in the New Franklin Case, as to whether or not the distribution of the money in question is controlled by Section 7 of Article IX of the 1945 Constitution, is conclusive. As we have already pointed out, the court held in that case that the disposition of the fund was not controlled by Section 7 of Article IX of the Constitution of Missouri, 1945.

Inasmuch as that constitutional provision does not control the distribution of the funds in question, we are of the opinion that they should be deposited in the general revenue fund of the state to be handled as other such revenue. As part of the general revenue of the state, one-third thereof should be set aside and placed in the public school moneys fund under Section 2.120 of House Bill No. 23, Sixty-fifth General Assembly.

In the New Franklin Case the court held that one-fourth of the fund involved should be placed in the public school moneys fund under Section 3 of Article IX, Constitution of Missouri, 1945, which requires that at least twenty-five per cent of state revenue be set apart for support of the free public schools. The Legislative enactment in effect at the time of the receipt of that money had appropriated one-third of the "ordinary general revenue" for the public school moneys fund. (Section 2.120, Laws of Missouri, 1945, page 417.) The word "ordinary" has now been omitted in the Legislative enactment, so that the question of whether or not the funds here involved are "ordinary state revenue" is not involved. (See State ex rel. v. Gordon, 266 Mo. 394, 418; 181 S.W. 1016.)

CONCLUSION

Therefore, it is the opinion of this department that the fines assessed and collected in the Seagram Anti-Trust case should be

Honorable R. E. Copher

considered state revenue, to be placed in the general revenue fund; one-third to be set apart and paid into the public school moneys fund under Section 2.120, House Bill No. 23, Sixty-fifth General Assembly.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



RRW/feh

AGRICULTURE: Persons starting operation of disposal
RENDERING PLANTS: plant and operating vehicles in connection
LICENSES: therewith must pay full amount of license
for calendar year.

September 25, 1950

9-28-50

Dr. H. E. Curry
State Veterinarian
Jefferson City, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

"We are enclosing letter from Mr. R. A. Sloan of the Midwest Packing Company, Inc., Des Moines, Iowa, advising that they have purchased the Missouri Tankage Company, Blackwater, Missouri.

"You will note that Mr. Sloan desires to know the amount of fee they will be required to pay for a license to operate the rendering plant, also the amount of the license fee for the four trucks, which they will operate in connection with the plant."

The letter from the Midwest Packing Company, Inc., states that such company has purchased the Missouri Tankage Company, Blackwater, Missouri, and took over the operation of the plant September 14, 1950, and will operate such plant under the trade name of Missouri Tankage Company. Such letter further asks you to advise the company what the proper license fees are, stating that the company will operate not over four trucks. We are further informed that the Midwest Packing Company purchased the assets of the Missouri Tankage Company, but did not purchase the stock of such corporation.

Section 14493-c, Laws of Missouri, 1941, page 290, provides as follows:

"Any person desiring a license under this act to engage or continue in the business of operating a disposal plant for bodies of dead animals, shall file an application

Dr. H. E. Curry

for such license with the state veterinarian, on a form provided by him without charge, which application shall set forth the name and residence of the applicant, the location of his place of business, the particular method, or methods, which he intends to employ, or is employing, in the transportation and in the disposal of the bodies of such dead animals; the number and location of all sub-stations he desires to operate, if any; the number and kind of vehicles he will use; and such other essential information relative thereto as the state veterinarian, by his rules and regulations, may require. Such application shall be accompanied by an initial installment of fifty dollars (\$50.00) on the total annual license fee, to apply upon the expenses imposed by this act."

Section 14493-d, Laws of Missouri, 1941, page 290, provides as follows:

"Upon receipt of such application, accompanied by the fee, the state veterinarian, or some person appointed and designated by him, shall, within thirty days, ascertain whether or not such applicant is a responsible and suitable person to conduct such business, and that if the disposal plant of such applicant, as herein defined, and if the methods of operation thereof comply with all the provisions of this act and with the rules and regulations herein authorized, and if such business is located in a place permitted by this act, he shall thereupon issue to such applicant a certificate to that effect."

Section 14493-e, Laws of Missouri, 1941, page 290, provides as follows:

"Upon payment by the applicant of twenty-five dollars (\$25.00) additional, the state veterinarian shall issue to such applicant a license and four vehicle certificates and metal discs bearing the applicant's name and license number, one of which discs shall be attached to each vehicle so used, which license shall entitle him to operate one

Dr. H. E. Curry

disposal plant and which certificates shall entitle him to operate not more than four vehicles for transporting bodies in such business; Provided, however, That for each such additional vehicle the licensee desires to operate he shall pay an additional annual fee of five dollars (\$5.00) and procure an additional vehicle certificate and disc, and for each sub-station located elsewhere than on the grounds of the disposal plant he shall pay an additional annual license fee of twenty dollars (\$20.00) and procure a sub-station license."

Section 14493-f, Laws of Missouri, 1947, Vol. I, page 26, provides as follows:

"All licenses and vehicle certificates issued under this act shall remain effective until and unless voluntarily surrendered, or suspended or revoked, as provided in this act; conditioned, however, upon payment to the state veterinarian on or before January 15 of each calendar year subsequent to the year of issue, of the required total annual license and other fees herein provided for and specified, as aforesaid, which payment shall operate, without further application, to continue such licenses and vehicle certificates in full effect during each calendar year for which such license and other fees shall be paid, unless sooner surrendered, or suspended or revoked, as herein provided."

It is to be noted that under the provisions of Section 14493-f, quoted supra, licenses issued under provisions of Section 14493-c and Section 14493-e are for the period from the date of issuance until the following January 14, when such licenses are renewed for a period of one year by a like payment. We find no provision in the law for a partial payment for a license for less than a period of one year. Therefore, it is our view that the license requirements as set forth in Sections 14493-c and 14493-e must be met by the Midwest Packing Company, Inc., in order to obtain licenses at this time.

Dr. H. E. Curry

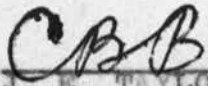
CONCLUSION

It is the opinion of this department that the Midwest Packing Company, Inc., which has purchased the assets and trade name of the Missouri Tankage Company of Blackwater, Missouri, and which Midwest Packing Company will operate the plant under the trade name of Missouri Tankage Company, must make the full payments required by Sections 14493-c and 14493-e, Laws of Missouri, 1941, page 290, before licenses for such plant can be issued.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

CBB:ml

SCHOOLS: Prosecuting attorney may exercise discretionary powers in instituting civil actions in which county is concerned.
PROSECUTING ATTORNEYS: (The opinion to Sunderwirth, March 21, 1946 (87) sent in answer to question No. 2 was withdrawn because of Opinion No. 96 - 1953.)

F I L E D

22

June 9, 1950

Honorable Robert A. Dempster
Prosecuting Attorney
Scott County
Sikeston, Missouri



Dear Sir:

Your letter at hand submitting certain questions to this department, which reads as follows:

"Enclosed you will find certain instruments, the originals of which were handed to me by Mr. J. Grant Frye, an attorney in Cape Girardeau. I desire to submit to you the following questions in connection with this matter:

"(1) Is it mandatory upon the Prosecuting Attorney to file a suit to recover money which is alleged to have been spent in Petition I, attached? My investigation reveals that the facts in this petition are not true; hence I decline to entertain it. Do I have any discretionary powers if I feel that I cannot make a case?

"(2) In this question the facts are these: There is no high school in the Commerce Consolidated School District of Scott County. This district has an agreement with the Benton School District which is adjacent to it for its high school students to attend the high school in the Benton District. The Commerce school bus transports its students to the school district line where the Benton School bus picks them up and takes them to the Benton High School. They are returned in the same manner. There are several Catholic students

Honorable Robert A. Dempster

in the Commerce area. They desire to ride this bus and do so in the same manner as the students attending the public school. The school board charges them no extra fare, and they ride free the same as the children going to the public school. There is sufficient room in the bus, they are not crowded and the only points involved are, first, are they permitted to ride at all in the bus, and, second, if permitted to ride at all, can the school board authorize them to ride free. May the school board permit them to ride if a fair and just transportation charge is made? The petition that has been prepared for my signature by Mr. Frye is Number II. I might point out that the families of the Catholic students contend that if the school board is agreeable to them riding free that no one else can complain for the Catholic families pay school taxes the same as non-Catholic families.

"(3) The next question that concerns me is whether any taxpaying citizen in the school district has authority under the law to bring suits similar to the ones marked Number One and Number Two, or do they have to be brought in the name of the Prosecuting Attorney?"

In answer to your first question we might first consider the applicable statutes relating to the duties of the prosecuting attorney.

Section 12942, R.S. Mo. 1939, in part, provides:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. * * *"

Honorable Robert A. Dempster

Section 12944, R.S. Mo 1939, in part, provides:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: * * *"

The above two sections have been construed to be in *pari materia* and are to be read together in determining the duties and rights of the prosecuting attorney. *State ex rel. Lashly v. Wurdemann*, 166 S.W. 348, 183 Mo. App. 28.

We might further state that it is a cardinal principle of interpretation that statutes in *pari materia* are to be treated as embodied in one section and considered together in order to elucidate the legislative intent. *State ex rel. Brokaw v. Board of Education of the City of St. Louis*, 171 S.W. (2d) 75. Consequently, in ascertaining the statutory duties of the prosecuting attorney relative to the commencement of both civil and criminal proceedings we look to the two sections above cited.

In reading the above sections we do not observe that the prosecuting attorney is given any particular discretionary powers in one type of proceeding and not in another, and it is our thought that whether in a civil proceeding or a criminal proceeding the prosecuting attorney, if he has any discretionary power relative to instituting a proceeding, could exercise it in the same manner in both types of cases.

Regarding the exercise of any discretionary power relative to institution of a legal proceeding, the Supreme Court, *en Banc*, in the case of *State on inf. McKittrick v. Wallach*, 182 S.W. (2d) 313, 353 Mo. 312, said at S.W. 1.c. 318, 319:

"The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability

Honorable Robert A. Dempster

of each to the other; that his duties further require that he intelligently weight the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. Such duties of necessity involve a good faith exercise of the sound discretion of the prosecution attorney. 'Discretion' in that sense means power or right conferred by law upon the prosecuting officer of acting officially in such circumstances, and upon each separate case, according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person. Such discretion must be exercised in accordance with established principles of law, fairly, wisely, and with skill and reason. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. Discretion denotes the absence of a hard and fast rule or a mandatory procedure regardless of varying circumstances. * * *

While the court, in the above case, was considering the discretionary power of the prosecuting attorney relative to the institution of criminal proceedings, we are of the opinion that the logic and reasoning of that decision would be applicable to the powers and duties of the prosecuting attorney in instituting a civil proceeding, particularly of the type contained in the petitions marked No. 1, which you have enclosed.

Therefore, in answer to your first question we believe that the prosecuting attorney in the performance of his statutory duties may exercise a sound discretion in determining whether or not a civil action should be instituted.

Your second question contains several parts which generally relate to legality of a school district providing transportation for school children attending parochial schools.

We are enclosing a copy of an opinion submitted to Honorable W. W. Sunderwirth, a Member of the Missouri State Senate, under date of March 21, 1946, in which it was concluded that legislation relating to the free transportation of pupils attending parochial schools does not violate any provision of the Constitution of Missouri. It is our thought that this opinion would answer the questions which you have submitted under paragraph (2).

Withdrawn -- see opinion 96-1953

Honorable Robert A. Dempster

We observe in the petition marked No. 2, which seeks to enjoin the transportation of parochial school children, and which seeks to recover back money for the school district which was expended for such transportation, that the County Superintendent of Schools of Scott County is made a party defendant. Such being the case, we are also enclosing a copy of an opinion submitted to Honorable Hubert Wheeler, Commissioner of Education, under date of November 29, 1949, in which it was concluded that the prosecuting attorneys are required to represent and defend county superintendents of schools in civil suits filed against such officials involving their official acts.

In view of the conclusion reached in the above opinion rendered to Honorable Hubert Wheeler, it is our thought that you, as Prosecuting Attorney, might be placed in an antithetical position of bringing a civil proceeding against an official of the county which, under the law, you may be in fact required to represent.

CONCLUSION

It is, therefore, the opinion of this department that the prosecuting attorney in the performance of his statutory duties relative to instituting civil proceedings may exercise a sound discretion in determining whether or not he should commence a civil action.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT: ml
ENCS

INSANE PERSONS: Lapse of time preventing operation of
PROBATE COURTS: Section 9356, the Probate Court of County
in which party regularly discharged from
state hospital takes up residence has
proper jurisdiction to commit said party
as insane poor person to state hospital.

July 17, 1950

Hon. W. A. Despain, Judge
Probate Court
County Courthouse
Eminence, Missouri



Dear Judge Despain:

Your recent opinion request reads in part as follows:

"A person was declared to be insane and so adjudged by the Probate Court of Shannon County. She was admitted to State Hospital No. 4, Farmington, Missouri, and at some later date was discharged by the Superintendent of the Hospital. The party adjudged insane took up her residence in Howell County, Missouri and since her return to Howell County, has been placed in the County Home (Poor Farm). Since the time of admittance to the County Home she has become so violent that it has become necessary to again confine her in the State Hospital.

"What Probate Court has the proper Jurisdiction, that of Shannon County or Howell County?"

Since you state in your request that the individual in question is now being kept at the county home of Howell County, we shall assume that she will have to be admitted to the state hospital as an insane poor person. We further assume that sufficient time has elapsed since her regular discharge from State Hospital No. 4 and the taking up of her residence in Howell County so as to prevent the operation of Section 9356, R. S. Mo. 1939. This section provides in part that: "Every patient in a state hospital shall be deemed to be the county patient of the county first sending him till one year after his regular discharge from the hospital."

Section 9328, Laws of Missouri 1945, page 907 reads in part as follows:

Hon. W. A. Despain, Judge

"The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto. Such probate court shall furnish the county court with a certified copy of the order finding the person to be an insane poor person and the order committing such person. The counties from which such insane poor person has been sent shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, * * * "

Prior to the amendment of Section 9328 in 1945, the jurisdiction vested in the probate courts by that amendment was held by the county courts of such counties. The only change made therein was giving to the probate courts that jurisdiction which prior thereto had been held by the county courts. This section as it formerly read was construed in the case of *Thomas v. Macon County*, 175 Mo. 68, 74 S.W. 999. In that case the court held at l. c. 73:

"Plaintiff next points to section 4867 which provides that: 'The several county courts shall have power to send to the asylum such of their insane poor as may be entitled to admission thereto.' And it specifies that the county shall pay for the support and maintenance of such insane poor persons as the county court may send to the asylum.

"Under that section, however, even the county court is not authorized by its arbitrary will or unlimited discretion to send any insane poor person it may select to the asylum at the expense of the county, but the court must hold due proceedings upon a petition filed showing that the insane poor person is 'a citizen residing in the county' and other essential facts as prescribed by the statute, and there must be a trial of the facts and a judgment of the court thereupon. (Secs. 4874 to 4878, inclusive.) The county court has no authority under those statutes to send a person to the asylum or maintain one there at the expense of the county who is not a resident thereof."

Hon. W. A. Despain, Judge

The court further held at l. c. 75,76:

"From the statutes and decisions above referred to we find that provision is made for the maintenance of a person in the insane asylum at the expense of the county in the following cases:

"First. When the county court adjudges a person who is 'a citizen residing in the county' to be insane and insolvent and orders him to be sent to the asylum at the expense of the county.

* * * * *

"In the first three of these categories the county court is required to take action and pass judgment and when it has done so the patient is held in the asylum at the expense of the county. And, as was held in State ex rel. v. Cole County Court, above referred to, that, if the county court in a proper case should refuse to take action, it may be required by mandamus to do so. But of the 114 counties in the State against which is the mandamus to go? In the case just cited it went against the county court of Cole County because the insane person in that case was a resident of that county. No county court has jurisdiction to send a person to the asylum who is not a resident of the county and therefore could not be required by mandamus to do so. * * * * *

In view of the above, it must be concluded that only the probate court of the county of residence has jurisdiction in this instance. Since the party in question took up her residence in Howell County following her regular discharge from State Hospital No. 4 and assuming that Section 9356 does not apply, it is our opinion that the Probate Court of Howell County is the court which has the jurisdiction to send to the state hospital the insane person here under consideration.

Hon. W. A. Despain, Judge

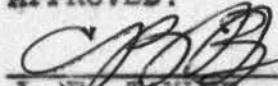
CONCLUSION

In the premises, it is the opinion of this department that the Probate Court of Howell County is the court which has the jurisdiction to send the insane poor person under discussion to the state hospital, as such person became and has since been a resident of Howell County following her regular discharge from the state hospital.

Respectfully submitted

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
ATTORNEY GENERAL

RHV:A

COUNTY PUBLIC HEALTH
CENTERS:
TITLE TO REAL ESTATE:

Title to real estate purchased for the use of
a county public health center should be vested
in the county for the use and benefit of the
county health center or council or its successors.

November 9, 1950



Mr. Robert A. Dempster
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Sir:

You have requested an official opinion from this department
upon the following question:

"In 1945 the Legislature passed some new laws with reference to the creation of county health centers. Laws of Missouri, 1945, page 965; Revised Statutes of Missouri, 1939, as amended, Sections 9854.101 and subsequent sections. By authority of this new law the people of Scott County voted a County Health Center. The Health Center was incorporated by pro forma decree and is functioning under that entity.

"The probability of acquiring real estate for the purpose of maintaining the Center has arisen. We would like your opinion as to whether title to such real estate should be taken in the name of the Scott County Health Council, the incorporated body, or in the name of Scott County for the benefit of the Scott County Health Council. Your opinion on this matter will be greatly appreciated."

Section 37 of Article IV of the Constitution of 1945, provides as follows:

"The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

Section 9854.108 R.S.A. (Laws 1945, page 969, Section 8)

Mr. Robert A. Dempster

provides as follows:

"All buildings that may be erected or constructed under this act shall have the plans and specifications approved by the board of directors of the official health organization and bids advertised for according to law for other county public buildings."

Section 9854.110 R.S.A. (Laws 1945, page 969, Sec. 10) provides as follows:

"Any person, firm, organization, society or corporation, desiring to make donations of money, personal property or real estate for the benefit of such health center, shall have the right to vest title of such property so donated, in the county or counties, to be controlled when so accepted by the official health organization, according to the terms of deed, gift, devise or bequest of such property."

Section 9854.111 (Laws 1945, page 969, Sec. 11) provides as follows:

"The public health center is established, maintained and operated for the improvement of health of all inhabitants of said county or counties."

Section 2480, R. S. Mo. 1939, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

This section refers to the county court and its administration of the affairs of the county.

Mr. Robert A. Dempster

The statutes referred to above creating the county health centers seem to show an intention on the part of the Legislature that the title of the property purchased or donated for the use of the public health centers would be vested in the county (or counties, in the event that the public health center served more than one county). The public health center to be within the constitutional provision cited must be considered a part of the county and the county government. The county is a political subdivision of the state but the public health center is not itself a political subdivision of the state.

The Supreme Court of Missouri in the case of Chouteau v. City of St. Louis, 56 S.W. 2d 1050, 331 Mo. 1206, said:

" * * * Of course, 'a county may take and hold property for such purposes as are authorized by statute, by donation, by devise or by dedication.' 15 C.J. p. 532

* * * * *

" * * * And in Abernathy v. Dennis, 49 Mo. 468, loc. cit. 470, we said: 'Counties are mere subdivisions of the State for governmental purposes, capable, however, of holding the title in fee to such lands as may be donated to them for their own use.' * * * "

CONCLUSION

It is the conclusion of this department that title to the real estate to be purchased by the Scott County health council should be vested in the name of Scott County for the use and benefit of the Scott county health council or its successors.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

STEPHEN J. MILLETT
Assistant Attorney General

SPECIAL : Method of election of commissioners to be de-
ROAD DISTRICT: termined by Board of Commissioners.

January 16, 1950.

1/23/50

Honorable William Lee Dodd,
Prosecuting Attorney
Ripley County,
Doniphan, Missouri.



Dear Mr. Dodd:

Your recent letter regarding the balloting in an election of a commissioner for the Jordan Special Road District reads as follows:

"On January 3, 1950, Jordan Special Road District held an election to elect a new commissioner. Ed. Brooks, a commissioner had ballots printed (3 ballots enclosed) for the election with his name printed on it and a square in front of his name and space to write in a name. Ballot No. I was voted with no X in front or any markings at all. Ballot No. II was voted with an X in the square. Ballot No. III was voted by marking out Ed. Brooks and writing in Phillip Davis. I want to know if Ballot No. I is legal should be counted as a vote for Ed. Brooks. The County Clerk does not know whether to swear in Ed. Brooks or not."

From your inquiry we assume that this special road district was organized under Article 11, Chapter 46 of the 1939 Revised Statutes.

It will be noted that the body formed under the provisions of this article, operating through its commissioners, possesses the usual powers of a public corporation for public purposes. The selection of commissioners for such special road districts formed under the provisions of this article is provided by section 8712, which, insofar as it applies to your question, provides as follows:

"At the term of court in which such order is made, or at any subsequent term thereafter, the court shall appoint three commissioners, who shall be residents of the district and owners of land within the district, who shall hold their office until the first Tuesday after the first Monday in January thereafter; and on said date the voters of the district, at an hour and place to be filed by said commissioners, shall elect three commissioners, one of whom shall serve one year, one for two years and one for three years, and on the first Tuesday after the first Monday in January each year thereafter they

shall elect a commissioner to take the place of the one whose term is about to expire, who shall serve three years.* * *"

Section 8710 of this article provides that "every such district organized according to the provisions of this article shall be a body corporate and possess the usual powers of a public corporation for public purposes * * *."

This article indicates that such bodies are authorized to conduct their business as a public corporation for public purposes and would, therefore, be empowered to determine the procedure for their elections. We think this rule is supported by the announcement of the Supreme Court in the case of *State ex inf. West ex rel. Thompson v. Hefferson*, 148 S.W. 90, 243 Mo. 442. The court said:

"We have already intimated in the first paragraph of this opinion the Legislature was careful to provide in the act creating this district that it should be 'a political subdivision of the state for governmental purposes,' as well as 'a body corporate,' with 'the usual powers of a corporation for public purposes,' so that it is not even relegated to the class of public quasi corporations, with which such subdivisions for special purposes are usually content to be classified. Although its general powers were vested in a board of commissioners, it did not, with equal care, prescribe the particular manner in which the elections for its members should be held. It did, however, prescribe qualifications for electors different from those prescribed in section 2, art. 8, of the state Constitution, thus indicating the express intention that they should not be governed by the general election laws of the state. The commissioners are to call these elections and indicate the time and place of their holding; and the implication is clear that the manner of taking, as well as ascertaining and recording, the result of the vote is left to that body.* * *"

Since this article does not prescribe the particular manner in which the election for commissioners should be held but leaves that to be determined by the corporate body itself, this office cannot render a more complete discussion on the validity of the ballots cast.

If you care to send to this office all the minutes of this body which deal with the manner of elections, we might be better enabled to render an opinion. We suggest you read the case cited above, if you have not done so already. It may help you decide the

questions presented.

As requested, the ballots enclosed with your letter are returned herewith.

CONCLUSION.

The Board of Commissioners of a special road district organized under Article 11, Chapter 46, Revised Statutes of Missouri, 1939, should determine the manner of taking, ascertaining and recording the vote in an election of Commissioner.

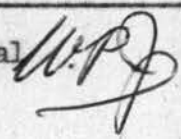
Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General

JEM/LD



ROADS DISTRICT,
SPECIAL

Costs of election to disorganize
special road district organized
under Chap. 46, Art. 10, must be
borne by County in which all or
greater part of district is located.

February 13, 1950

FILE # 24

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Mr. Dodd:

We have your recent request for an opinion from this office.
Your letter of request is as follows:

"The landowners of Pratt Special Road District,
Ripley County, Missouri, filed a petition to have
the district disorganized. Who must pay the cost
in the proceedings? Does it make any difference
as to whether the district is dissolved or not
as to who pays the cost?"

You do not state under what statute the Pratt Special Road
District was organized. We note however, that Ripley County is
under county government organization; special road districts
organized in such counties are governed by the provision of
Chapter 46, Article 10 and 11, R. S. Missouri, 1939. We assume
because you are concerned with the costs, that you refer to a
dissolution by election, as provided by Article 10, supra.

Section 8706, Chapter 46, Article 10 R. S. Missouri, 1939,
is as follows:

"If any district shall have adopted the pro-
visions of this article the question may be re-
submitted after the expiration of four years upon
the petition of fifty resident taxpayers of said
district at the next general election, or at a special
election to be held for that purpose at such time as
the County Court may order. The County Court shall
give notice of such election and of such submission
by publishing the same in some newspaper published
in the County - such notice to be published for two
consecutive weeks and the last insertion to be within five

Hon. William L. Dodd
Doniphan, Missouri

days next before such election; and such other notice may be given as the Court may think proper. The County Court shall have the ballots for such election printed and shall have printed on such ballot 'For the disorganization of the Special Road District', 'Against the disorganization of the Special Road District', with the direction 'Erase the clause you do not favor'. If a majority of the votes upon such proposition be cast against it said district shall be disincorporated and the operation of the law shall cease in said district. In all other respects said election, and the result thereof, shall be governed by the provisions of Article 10, Chapter 46, Revised Statutes of Missouri, 1939."

(Underscoring ours.)

The significant part of the statute set out above is that sentence (which we have underscored) which states that the election for the disorganization of a special road district shall be governed by the provisions of Art. 10, Chap. 46, R. S. Missouri, 1939.

The only part of said Article 10, which considers the question of the costs, or expenses of a special road district election is Sec. 8705, R. S. Missouri 1939, as follows:

"The expenses of such election shall be borne by the county within which is all or the greater part of the territory of the proposed district."

233.020
Repealed, 1978

Although Section 8705, supra, refers specifically to an election for the creation of a special road district, the underscored sentence in Section 8706 makes it clear that Section 8705 is intended to apply also to an election for the disorganization of such a district. It is therefore apparent that the expenses of an election to disorganize a special road district must be paid entirely by the county in which the whole or greater part of the district is located.

You ask further if it would make any difference (as to costs of the election) whether the district is actually dissolved by the election. No. section in said Art. 10, indicates that any other rule has been made in such an event, and therefore, it follows that said Sec. 8705 applies regardless of the result of the election.

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Doniphan, Missouri

CONCLUSION

It is the opinion of this department that the expenses of an election to disorganize a special road district organized under the provisions of Art. 10, Chap. 46, R. S. Missouri, 1939 must be paid by the county in which the whole or the greater part of the district is located. Said county must bear the costs of the election regardless of the result of said election.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ROAD DISTRICTS:

SPECIAL:

Special Road District, organized under Article 11, Chapter 46, Revised Statutes of Missouri, 1939 must bear costs of proceedings to dissolve such district. If County Court decides against dissolution, costs must be borne by petitioning landowners.

March 2, 1950.



Honorable William Lee Dodd,
Prosecuting Attorney,
Ripley County,
Doniphan, Missouri.

Dear Mr. Dodd:

We have your recent request for an opinion from this office. Your letter of request is as follows:

"The landowners of Pratt Special Road District, Ripley County, Missouri, filed a petition to have the district disorganized. Who must pay the cost in the proceedings? Does it make any difference as to whether the district is dissolved or not as to who pays the cost?"

You have since informed us that the Pratt district was formed under Chapter 46, Article 11, R.S. Mo., 1939. Section 8731 of Article 11, supra, provides for the dissolution of a special road district as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land, within a road district organized under the provisions of this article shall be filed with the county court of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced to disincorporate such road district. No such road district shall be disincorporated until notice be published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition."

The section set out above is silent on the matter of costs; nor does any other section in Article 11, supra, specifically

March 2, 1950.

Hon. William Lee Dodd - # 2

provide for the assessment of costs in case of a dissolution. We must therefore resort to the general law, as well as implications gathered from other sections of Article 11. Your letter asks two questions, that is, who pays the costs if the district is not dissolved, and who pays if it is. Upon whom the burden ultimately falls is discussed below, but at this point it seems clear that the initial costs, such as filing fees, advertising, etc. must be paid in the first instance by those who initiate the action, i.e., the landowners in the Pratt District.

Section 13403 R.S. Mo. 1939 provides in part as follows:

" * * * Fees of clerks of county courts. -
The clerks of the county courts, respectively,
shall be allowed fees for their services as
follows:

For reading and filing every petition, and recording the order made thereon, to be paid by the petitioners40

For copying the petitions, orders, plats and surveys of roads and all other records pertaining thereto, for every hundred words and figures, to be paid by the petitioners10"

Assume then, that the petitioners have borne the expenses to the point of actual decision, what would be the effect, upon responsibility for costs, of a decision that the district be dissolved?

Section 1406 R.S. Mo. 1939 is as follows:

"In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

The effect of this statute would be to return the costs to the petitioner if the district were in fact dissolved. In such event the road district would be the logical party to bear

March 2, 1950.

Hon. William Lee Dodd - # 3

the costs and the following parts of Article 11, supra, so indicate.

Article 11, Section 8715, provides in part as follows:

" * * * All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district, and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law."

Section 8721, supra, provides in part as follows:

" * * * All money collected on special tax bills and all money the commissioners may so borrow, and all interest that may accrue thereon while on deposit in any county depository, shall be used, and warrants drawn on the treasurer therefor, for the following purposes only: To pay the cost and expense incurred by the commissioners, as found by the court, in the preparation of such plans, specifications, estimate, map and profile, and said list of lands, and a reasonable attorney's fee, as found by the court, for such petitioners, and to pay the cost of improving said public road or part of a public road in accordance with the plans and specifications so filed with the clerk of the county court, and such working, administrative and incidental expenses, not otherwise provided for by law, as may be incurred in making such improvement and in procuring, collecting and paying the cost of such improvement, * * *"

Section 8734, supra, providing for duties of trustee of dissolved road district is as follows:

March 2, 1950

Hon. William Lee Dodd - # 4

"The trustee shall have power to prosecute and defend to final judgment all suits instituted by or against the road district, collect all moneys due the same, liquidate all lawful demands against the same, and for that purpose shall sell any property belonging to such road district, or so much thereof as may be necessary, and generally to do all acts requisite to bring to a speedy close all the affairs of the road district, and for that purpose, under the order and direction of the county court, to exercise all the powers given by law to said road district."

The sections of Article 11, set out above, strongly indicate that the road district funds shall bear the expenses connected with the organization, maintenance and dissolution of a road district, such as the one with which we are here concerned.

It is therefore our opinion that the costs of dissolving a road district organized under Article 11, Chapter 46, R.S. Mo., 1939, must be borne by the road district itself, and that all costs incurred by the successful petitioners should be returned to them.

If, on the other hand, the county court, in its discretion determines that the road district should not be dissolved, the petitioners, as the unsuccessful party, must bear the costs in accordance with the rule established by Section 1406, supra.

CONCLUSION

It is the opinion of this office that if a special road district, organized under the provisions of Article 11, Chapter 46, R. S. Mo., 1939, is dissolved by the county court, the costs of such proceeding must be borne by the road district. If, on the other hand, the county court decides against dissolution, all costs must be borne by the petitioning landowners.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

H. JACKSON DANIEL
Assistant Attorney General

HJD;cg

DEPUTY CIRCUIT CLERKS IN
FOURTH CLASS COUNTIES:

Deputy circuit clerks and assistants
may be appointed by circuit clerk
with approval of circuit court and
salary paid out of county treasury.

March 9, 1950

3/10/50

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Sir:

This office is in receipt of your recent request for an official opinion. You thus state your request:

"The circuit clerk has a deputy and her salary is set by the Circuit Judge. Is it legal for the County Court to allow the circuit court a sum of money to employ extra clerical hire when needed?"

We would first point out that Ripley County is a county of the fourth class.

We would next direct your attention to Section 13147b, Laws of Missouri, 1945, page 1425, which states:

"In all counties of the fourth class, the clerks of the circuit court shall be ex officio recorder for their respective counties."

We next call your attention to Sections 5 and 6 and 7, Laws of Missouri, 1945, pages 1531 and 1532, which state:

Section 5.

"The circuit clerk and recorder in counties of the fourth class shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge

March 9, 1950

of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk and recorder to appoint deputies or assistants, shall fix the compensation of such deputies or assistants, which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk and recorder may at any time discharge any deputy or assistant, and may regulate the time of his or her employment and the circuit court, may at any time modify or rescind its order permitting an appointment to be made."

Section 6.

"The circuit clerk and recorder in counties of the fourth class, as recorder of the county, may appoint in writing one or more deputies, to be approved by the county court, which appointment with the like oath of office as their principals to be taken by them and indorse thereon shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorders of deeds, but all circuit clerks and recorders and their sureties shall be responsible for the official conduct of their deputies."

Section 7.

"All annual salaries provided in this act shall be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury."

Your question, stated above, relates to deputy circuit clerks and assistants, and Section 5, quoted above, relates to deputy circuit clerks and assistants only. The number of deputies and assistants that the circuit clerk in fourth class counties may have is to be determined by the circuit court, without whose approval a circuit clerk may not appoint such deputies and assistants. If the circuit

Hon. William Lee Dodd

March 9, 1950

judge, upon the recommendation of the circuit clerk, and by order of record approves the appointment of a second full or part-time deputy or assistant, the circuit clerk may proceed to appoint such deputy or assistant, whose salary will be paid by the county. In such case the county court could not allow a sum of money to the circuit court for the purpose of paying the salary of such second deputy or assistant; inasmuch as by Section 7, quoted above, such salary would be paid out of the county treasury of your county.

CONCLUSION

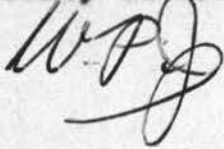
In fourth class counties a circuit clerk may, with the approval of the circuit court, appoint additional deputies and assistants whose salaries will be set by the circuit court and paid out of the treasury of the county.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

Attorney General



HPW:hr

PRELIMINARY
HEARING:

Transcript of testimony at preliminary hearing need not be delivered to defendant when defendant is released on bond. Transcript of testimony is to be delivered to clerk of the court in which the offense is cognizable.

March 9, 1950

FILE NO. 24

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Sir:

This office is in receipt of your recent request for an official opinion. You thus state your request:

"The defendant is charged with first degree murder and is given a preliminary hearing and bound over for Circuit Court but is given bail by the Magistrate. Does the law require that the defendant be given a copy of the evidence at the preliminary hearing? What must be done with the transcript of the evidence?"

Section 3870, Mo. R. S. A., 1939, states:

"In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

Section 3879, Mo. R. S. A., 1939, states:

"All examinations and recognizances taken in pursuance of the provisions of this article shall be certified by the magistrate taking the same, and delivered to the clerk of the court in which the offense is cognizable, on or before the first day of the next term thereof, except that where the prisoner is committed to jail, the examination of himself and of the witnesses for or against him, duly certified, shall accompany the warrant of commitment, and be delivered therewith to the jailer."

Hon. William Lee Dodd

March 9, 1950

Since the defendant was given bail in this case the requirements of the statutes are satisfied if the transcript of the testimony taken at the preliminary hearing is delivered to the clerk of the court in which the defendant will be tried, because since he is out on bond it will be available to him and to his attorney.

Section 3879 also answered the remainder of your question by stating, as quoted above, that "All examinations and recognizances taken in pursuance of the provisions of this article shall be certified by the magistrate taking the same, and delivered to the clerk of the court in which the offense is cognizable, * * *"

CONCLUSION

It is the conclusion of this office that where a defendant is released on bond he need not be given a transcript of the testimony taken at his preliminary hearing.

It is the further conclusion of this office that a transcript of the evidence taken at the preliminary hearing must be delivered to the clerk of the court in which the defendant will be tried.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

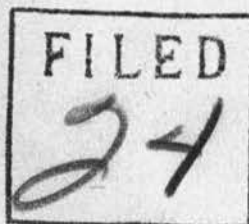
Attorney General

CHILDREN) A child born in wedlock is presumed to be legitimate; the
) father of an illegitimate child can be made to support such
) child.

May 1, 1950

5/2/50

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I have a juvenile case involving a neglected child. The mother was pregnant when she married a Mr. Tune. Tune knew she was pregnant but he married her anyway. This child was then born after wedlock. Since then the mother claims the child does not belong to Mr. Tune but belongs to a Mr. Bessent. The mother was in contact with both men and either could have been the father. I do not have a Missouri Digest to look up the law and I would like answers to some questions of law.

1. What are Bessent's right to claim parenthood of the child?
2. Could he be made to support the child?
3. What presumptions are there that Mr. Tune is the father?
4. What proof is necessary to show Mr. Bessent is the father and must support the child?"

Your first question is: What are Bessent's rights to claim parenthood of the child? It seems obvious that any man can claim the parenthood of any child. Proving parenthood is, of course, altogether another matter. Claiming parenthood is not a matter of right but is simply a matter of doing it.

Honorable William Lee Dodd

We believe that in framing this question you may have meant to ask: How could Bessent prove his parenthood of this child? He could do this by showing, first, that Mr. Tune could not, either because of absence during the period of conception, or physical incapacity, have been the father. And second, by proving that no man other than himself (Bessent) had had intercourse with the mother of the child during the period of its conception. In view of the circumstances which you relate, we deem that proof of this second matter would be difficult to the point of impossibility.

Your second question is; could he (Bessent) be made to support the child?

Your third question is; what presumptions are there that Mr. Tune is the father of the child? For reasons which we hope will presently appear, we shall answer your third question before we answer the second, and in answering it we direct your attention to the case of *Ash v. Modern Sand & Gravel Co.*, 122 S.W. (2d) 45, 1.c. 50. In that part of the opinion in the *Ash* case which is pertinent to the issue before us the court said:

"The strenuous effort made to bastardize the boy claimant, we think signally failed as it deserved to fail. The commission failed to make a finding on this issue. Every child born in wedlock is presumed to be legitimate. Public policy sanctions this view. *Bower v. Graham*, 285 Mo. 151, 225 S.W. 978; *Gates v. Seibert*, 157 Mo. 254, loc. cit. 272, 57 S.W. 1065, 80 Am. St. Rep. 625; *Busby v. Self*, 284 Mo. 206, 223 S.W. 729.

"Such presumption in favor of the legitimacy of children born in wedlock is the strongest known to the law, and the courts in their righteous zeal to protect the innocent offspring will not permit this presumption to be overthrown unless there is no judicial escape from such a malign conclusion. *Nelson v. Jones*, 245 Mo. 579, 151 S.W. 80; *Maier v. Brock*, 222 Mo. 74, loc. cit. 100, 120 S.W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673; *Jackson v. Phalen*, 237 Mo. 142, 140 S.W. 879; *Stripe v. Meffert*, 287 Mo. 366, 229 S.W. 762; 7 C. J., Par. 6, p. 940.

Honorable William Lee Dodd

"To overthrow this presumption the evidence must show conclusively that the husband, by reason of absence or otherwise, could not have had sexual intercourse with the wife at the beginning of any reasonable period of gestation. Drake v. Milton Hospital Ass'n, 266 Mo. 1, 178 S.W. 462. * * *"

In the case of Boudinier v. Boudinier, 203 S.W. (2d) 89, 1.c. 97, the court said:

"Pronouncements of the Supreme Court of our state have clearly demonstrated that the modern and prevailing rule is that the presumption that a child born during the period of lawful wedlock is legitimate may be rebutted and overthrown by proof of facts to the contrary. In the case of Bower v. Graham, 285 Mo. 151, loc. cit. 162, 225 S.W. 978, 980, in the course of the opinion the court states: 'We do not, however, think it improper to consider this record from the standpoint that the presumption arising from the birth of the child in lawful wedlock may be disputed by showing the fact to be otherwise.' In the case of Drake v. Milton Hospital Ass'n, 266 Mo. 1, on page 11, 178 S.W. 462, on page 464, the court said: 'The presumption that a child born in wedlock is legitimate is not an absolute one, but is rebuttable.' The foregoing pronouncements apparently have never been overruled or criticized. In Needham v. Needham, Mo. App. 299 S.W. 832, 834, the St. Louis Court of Appeals, after reference to the presumption that prevailed at common law states: 'The modern doctrine undoubtedly is that the presumption may be overthrown by any competent and relevant evidence, disclosing that the husband could not have been the father of the child.' Citing the Drake case, supra. Cf. Morrison v. Nicks, Ark. 200 S.W. (2d) 100."

The Boudinier case and the Ash case are in complete agreement that a child born in wedlock is presumed to be legitimate, that is, that it is presumed to have been born as a result of sexual intercourse between its mother and the man to whom she was married at

Honorable William Lee Dodd

the time the child was born. Both cases agree that this presumption may be overcome by sufficient evidence to the contrary. Therefore, the answer to the third question is that Tune is presumed to be the father of this child, and that, in the words of the Ash case, this presumption is one of the strongest known to the law.

In answering your second question we direct your attention to the case of State v. Williams, 224 S.W. (2d) 844, 1. c. 848. In this case one Williams was charged with non-support of a child born out of wedlock, of which child he did not have the care or custody, of which child he was alleged to be the father. The lower court made a finding that Williams was the father, and the appellate court sustained his conviction in the lower court on the charge of non-support. In the course of its opinion the appellate court stated:

"Reduced to its simplest terms, we, therefore, have before us a case which is governed by the 1947 statute, supra, wherein it is made a crime for any man or woman who shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, etc., for his or her child or children born in or out of wedlock under the age of sixteen years. There was substantial evidence adduced by the State at the trial to show that defendant herein is the parent of the child in question. The prosecuting witness, the mother of the child, so testified. The Associate Prosecuting Attorney testified that the defendant admitted that he was the father of the child. The defendant did not deny or contradict the State's evidence. Furthermore, there was substantial evidence showing that defendant failed to support the child during certain periods and finally refused to do so, although he was able to and did earn substantial wages during that time. Therefore, all the elements necessary to be proved under the statute as it now stands were shown by substantial evidence.

"The fact that the State did not prove that the defendant had the legal care or custody of such minor child is immaterial because it is not necessary in a case of this kind to prove that defendant had such care and custody where, as here, there is substantial evidence showing that the defendant is the parent of the illegitimate child. It is only where the charge of non-support of a child is made against one who is not a parent that the element of having

Honorable William Lee Dodd

the legal care or custody of such child must be shown in addition to the failure or neglect to provide adequate food, clothing, etc., for such child. This is true because the statute plainly makes it so for it says in a separate statement of such offense: 'or if any other person having the legal care or custody of such minor child, shall without good cause, fail * * * to provide adequate food, clothing, * * * then such person shall be deemed guilty of a misdemeanor.' (Emphasis ours.) It is well known that persons who are not the parents of children are frequently awarded the care and custody of children by the courts and it was the clear intention of the Legislature to make them as well as parents answerable to the law for neglect of their duty."

The answer to your second question, therefore, is that if Bessent acknowledged the child to be his, or if the court made a finding that he was the father, that then he could be made to support the child.

Your final question is: What proof is necessary to show that Bessent is the father and must support the child? We believe that our answer to your questions above fully answer your final question.

CONCLUSION

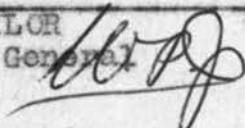
It is the opinion of this department that a child born in wedlock is presumed to be legitimate; that the father of an illegitimate child can be forced to support such child if he acknowledges that he is the father of the child or if the proper court so finds.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



HPW/hr

ROADS:

Board of Commissioners of Special Road District organized under Article 10, Chapter 46 R. S. Mo. 1939, shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village, therein to construct, improve and repair such highways, and this control shall include all streets dedicated to the public use which may lie in an unincorporated community within the special road district.

June 21, 1950.

4/21/50

Honorable William Lee Dodd,
Prosecuting Attorney
Ripley County,
Doniphan, Missouri.



Dear Sir:

This department is in receipt of your recent letter requesting an opinion on the following question:

"The Doniphan Special Road District was organized under Article 10, Chapter 46, Revised Statutes of Missouri, 1939, Now Section 8562 R. S. 1939 says that the County Court shall have control of streets and alleys in unincorp. villages, but does the section apply to streets and alleys in unincorp. villages located within the boundary of a Special Road District organized under Article 10, Chapter 46, R. S. 1939? Does Section 8682 R. S. 1939, give the control of streets and alleys (public roads) to the Commissioners of Doniphan Special Road District? Does Section 8685, R. S. 1939, give this control to Doniphan S.R.D.?"

"Are streets and alleys in unincorp. villages treated differently than public roads?"

ST

"The road in question is a street dedicated to public use and located in an unincorp. village within the limits of the Doniphan Special Road District."

Mo. R. S. Section 8562 reads as follows:

"All streets and alleys in unincorporated towns and villages shall be under the control of the county court, and governed by the laws relating to roads and highways." (Emphasis ours).

Honorable William Lee Dodd.

In addition to the statutory powers conferred upon the county court to act as the administrative body charged with the duty of control, construction, maintenance, upkeep and repair of county roads, Article 10, Chapter 45, R. S. Mo. 1939, provides for the organization of special road districts wherein the duty to construct and maintain the roads within the special road district is divested from the county court and invested in a board of commissioners. Section 8673 reenacted L. 1945, p. 1494, authorizes the organization of a special road district in these words:

"Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as hereinafter set forth into a special road district.* * *"

Provision is then made within this article for the organization of a Board of Commissioners and a part of their duties are prescribed by Section 8682, R. S. Mo. 1939, in these words:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

Section 8562 (cited supra), which confers control of streets and alleys in unincorporated villages upon the county court must be treated in the same fashion as other general statutes conferring such control upon the county court for all county roads and bridges, and Section 8682 transfers this control to the special road district by providing for a board of commissioners to have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways. The roads, streets and alleys lying within an unincorporated village must be under the same exclusive and entire control and jurisdiction of the Board of Commissioners of the special road district as are all roads outside of the corporate limits of a city, town or

Honorable William Lee Dodd,

village.

It is the opinion of this department that streets and alleys of an unincorporated village are treated no differently than any other public roads lying within the special road district, and outside an incorporated city, town or village.

Parts of several other sections of this article enumerate the powers and duties of the Board of Commissioners to control the construction, maintenance and repair of roads within the special road district. You may wish to note such sections from the 1939 R. S. Mo. as 8674, 8681, 8685, 8688, 8691, 8696, 8697 and 8700, which confer upon the Board of Commissioners of the "eight mile" special road district those duties which would otherwise devolve upon the county court.

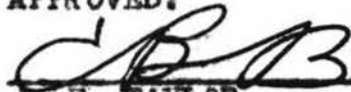
CONCLUSION.

The Board of Commissioners of a special road district organized under Article 10, Chapter 46, R. S. Mo. 1939, shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways and this control shall include all streets dedicated to the public use which may lie in an unincorporated community within the special road district.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney-General

APPROVED:


J. E. TAYLOR
Attorney-General.

JEM/ld

LIQUOR:

Obstruction of 1/3 to 1/2 of windows
of tavern by curtains constitutes no
violation of Liquor Control Act.

INTOXICATING LIQUOR:

November 21, 1950

FILED

24

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This is in reply to your request for an opinion
which is as follows:

"The Rainbow Inn is a beer tavern located in Ripley County, Missouri, On the West side is located about 6 or 7 windows. The operator has hung curtains on these windows which partially obstruct or obscure the interior of such room. They do not completely obstruct the view but do obstruct about 1/3 to 1/2 of the window. Now under Sec. 4899 R.S. 1939 do the above state of facts show a violation of the law? The outside door has no obstruction. Does the law mean the entire interior must be obstructed or obscure from public view? If this is a violation does Sec. 4933 R.S. 1939 provide the punishment?

"Please give me a legal interpretation of Sec. 4899 R.S. 1939 as to the meaning of 'obstructing or obscuring the interior of such room from public view'."

Section 4899, R.S. Mo. 1939, reads as follows:

"Nothing in this act shall be so construed as to authorize the sale of intoxicating liquor in the original package, or at retail by the drink for consumption on the premises where sold, in

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a place commonly known as a 'saloon', and no license shall be issued by any city council, board of aldermen or other authorities of any city in this state, nor by the supervisor of liquor control, for the sale of intoxicating liquor at retail by the drink for consumption on the premises where sold, in a place commonly known as a 'saloon', nor in any building or room where there are blinds, screens, swinging doors, curtains or any other thing in such building or room that will obstruct or obscure the interior of such room from public view. It shall also be unlawful for the holder of any license authorized by this act, for the sale of any intoxicating liquor at retail by the drink for consumption on the premises where sold, to keep or secrete, or to allow any other person to keep or secrete in or upon the premises described in such license, any intoxicating liquor, other than the kind of liquor expressly authorized to be sold by such license."

(Underscoring ours.)

Section 655, R.S. Mo. 1939, provides, in part, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, * * *."

Webster's New International Dictionary, Second Edition, defines the word "obstruct" to mean: "To cut off the sight of (an object); shut out" and "obscure" is defined as: "Not readily seen" and is synonymous with "indistinct, shadowy". We are unable to find a case on

Honorable William Lee Dodd

all fours with the facts as outlined in your request. However, we find an interpretation of the law taken by the General Sessions of Delaware in the case of State vs. McCann, 90 Atl. 81. In its charge to the jury the Court said:

"Gentlemen of the jury: Edward J. McCann stands charged under this indictment with the violation of a statute of this state, passed in 1889, which provides that 'every person licensed under this act shall keep his principal place of business, so as to be seen fully and easily by passers-by, and shall not obstruct such view by screens, blinds, inside shutters, frosted glass, or any other device, of whatsoever kind or character.' Ordinarily we call it the screen act, and the defendant is charged with the violation of that act.

"* * *The sole question here is whether Edward J. McCann, the party charged, under this indictment, has kept his principal place of business so open and free from obstruction as to be seen fully and easily by passers-by. If he has done that, he is not guilty.

"The burden is upon the state to show to your satisfaction, by the evidence, beyond a reasonable doubt, that this man did exactly what he is charged with; that is, by reason of some device or an obstruction of some kind, the view of his saloon or principal place of business, was not fully and easily discernible to the ordinary passer-by.

"This law applies to ordinary passers-by, tall people, as well as short people, and you should be reasonable in the meaning and application of this act. It applies to the ordinary passer-by, the general public.

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"The statute provides that the principal place of business of a licensed liquor dealer shall be kept in such a way as to be fully and easily seen by passers-by and such view shall not be obstructed by screens or any other devices. The court cannot think of any language more simple or more easily understood. The view of the principal place of business is to be unobstructed and so open and clear that it can be fully and easily seen by ordinary passers-by; that is, by the public which passes by, and the public is composed of men and women of all sizes. The statute provides that the principal place of business shall be kept in view of passers-by, and that means that the principal place of business shall be readily seen by or observed by the public, and that anything which tends to hinder or block or obstruct the full and easy view would be a violation of the statute."

This charge indicates that the statutes known as "Screen Acts" are violated when the view of the place of business is obstructed and is not readily seen or observed by the public. So, also, the above definitions of the words of Section 4899 seem to indicate that all that is required is that there be a view of the interior.

The construction of a statute by administrative officials charged with the enforcement thereof is entitled to great weight. (State ex rel. Hanlon vs. City of Maplewood, 99 S.W. (2d) 138, 231 Mo. App. 739.) Courts often resort to this rule when faced with the necessity of construing the language used by the Legislature in a particular Act. In this connection we desire to call your attention to Section E of Regulation No. 12 as promulgated by the Supervisor of Liquor Control.

"(e) Visibility.--Retailers shall not place or permit the placing of any object on or within the windows of premises

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covered by licenses which shall impede or obstruct vision from the exterior into the interior. This prohibition shall include illuminated signs, floral decorations, posters, placards, paintings or writings, and all other similar devices or designs.

"In case Venetian blinds are used in windows, slats must be removed entirely across the blind so as to make visible space beginning at four feet from the sidewalk and extending six feet above the sidewalk, if such venetian blinds are kept closed. If the venetian blinds are kept open it shall not be necessary to remove such slats provided the slats shall at all times be horizontally adjusted so that the flat surfaces thereof are parallel with the floor of the licensed premises. If curtains are used, they must be drawn apart so as to permit a clear view into the interior of the premises.

"Lighting Requirements.--No holder of a retail license shall use illuminated brand signs exclusively for illuminating purposes. Sufficient light must be maintained at all times to insure clear visibility into the interior and within the interior of the premises."

You will note that throughout this section the emphasis has been placed upon the requirement that a clear view into the interior of the premises be permitted. We believe this to be consistent with the intent of the Legislature in the enactment of Section 4899, and that so long as the view of the interior of the room is not completely obstructed or obscured there is no violation of the statute.

You state in your opinion request that the curtains do not obstruct the view but only obstruct about 1/3 to 1/2 of the window. Under these facts we believe there is no violation.

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CONCLUSION

Therefore, it is the opinion of this department that the obstruction of a window by curtains hung so as to obstruct only 1/3 to 1/2 of the window, but which still permit a view of the interior, does not violate Section 4899, R.S. Mo. 1939.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS: Warrant issued by school district to pay indebtedness exceeding revenue for particular
WARRANTS: year is void; warrant cannot be issued in subsequent year to pay previous warrant issued.

December 18, 1950

12/18/50
FILED

24

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"A school district (common) issued a warrant for a school district debt, but there was no funds with which to pay the warrant in the county school fund. In another year the school board issued a warrant to pay said void warrant. Is this later warrant valid and payable by the county treasurer? Does the school board have authority to issue said warrant?"

You further informed us that the warrant in question was issued after warrants to the full extent of the anticipated revenue of the school district for the particular year involved had already been issued.

Section 26, Article VI of the Constitution of Missouri, 1945, in part, provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

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The above section is substantially the same as Section 12, Article X of the Constitution of 1875, which, in part, provided that no school district could become indebted in any manner or for any purpose to an amount exceeding in any year the income or revenue provided for such year, without the consent of two thirds of the voters. Section 26, supra, also provides for a school district becoming further indebted by a two-thirds vote.

Section 10366, Laws of Missouri, 1943, page 893, relating to the disbursement of school moneys, in part, provides:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. * * * School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose; the date of the board order, and the number of the warrant. Each warrant must be signed by the President and the Secretary or Clerk. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness. * * * No county, township, or school district treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following, * * *"

The above section, which pertains to all classes of schools, provides that the disbursement of school moneys must be made by warrant duly drawn by the Board of Education, and that no warrant shall be drawn for the payment of any indebtedness unless there is sufficient money in the treasury to cover said payment. The latter part of said section further provides that no warrant shall be honored against a school district that is in excess of the income and revenue of the school district for its fiscal year.

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In your request you inquire if the void warrant, to which we have previously referred, can now be paid by the issuance of another warrant out of revenue or income derived in a subsequent year.

In the case of Pullum v. Consolidated School Dist. No. 5, 211 S.W. (2d) 30, the Supreme Court, in construing Section 12, Article X of the 1875 Constitution, in its application to a school district incurring indebtedness, said at l.c. 34:

" * * * The quoted language of the Constitution of 1875 has been uniformly construed as permitting the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created and as prohibiting the anticipation of the revenues of any future year. * * *

"In cases in which the constitutional issue has been raised, it is said the situation at the time a debt is contracted or created determines whether or not a debt is void under Section 12, Article X, Constitution of 1875. * * *"

Under the above case it would appear that, in incurring indebtedness and in issuing warrants in payment thereof, a school district would be permitted to anticipate the current revenues of the particular year in which the indebtedness was incurred, but would not be permitted to anticipate the revenues of future years in incurring any particular indebtedness.

In the case of Barnard & Co. v. Knox County, 105 Mo. 382, suit was instituted upon a protested warrant issued by the County Court of Knox County in 1885 to pay for certain books and stationery. The defense was that the debt for which the warrant was issued was in excess of the revenue for the year 1885. In ruling on the question the court, at l.c. 390, said:

"It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such surface view of the matter. The constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials

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themselves, to take notice of the limit prescribed by the constitution. 1 Dill. Munic. Corp. (4 Ed.) sec. 134a. Soliciting agents, contractors and others who deal with county officials must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. * * *

In the case of Kane & Co. v. The School Dist. of Calhoun, 48 Mo. App. 408, suit was instituted to recover on a warrant issued to pay for some school furniture. It was directed that payment of the warrant would be made about two years after the date of its being issued. In ruling that this was invalid the court, at l.c. 413, 414, said:

"* * * More than this, the so-called treasurer's warrant purports to bind the school district two years in the future, in that the treasurer is directed to pay the same about two years after its date. The evidence conclusively shows that there was no money on hand then to pay the same nor any provided for in that fiscal year. Hence, this order was an effort to pledge the future credit of the defendant, in clear violation of section 12, article 10, constitution of Missouri, which reads: 'No * * * school district * * * shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose.' * * *"

In other words, under the above case it would appear the court has held that the income and revenue of a subsequent year or years could not be used to pay a warrant issued in a previous year which could not then be paid due to the fact that no money was available. That is to say, the previous warrant had been issued to pay indebtedness in excess of the income and revenue of the fiscal year in which said indebtedness was contracted.

CONCLUSION

It is therefore the opinion of this department that a


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warrant issued by a school district to pay indebtedness in excess of the income or revenue for the particular year in which the indebtedness was contracted would be void, and that said warrant could not be paid out of revenue for a subsequent year by the issuance of another warrant.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



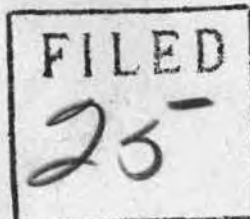
J. E. TAYLOR
Attorney General

RFT:ml

COUNTY TREASURERS: Dual capacity of county treasurer and treasurer of six-director school district is prohibited
SCHOOL DISTRICTS: by public policy and violates the rule against holding incompatible offices.

January 11, 1950

Honorable Ralph H. Duggins
Prosecuting Attorney
Saline County
Marshall, Missouri



1/19/50

Dear Sir:

The following is in reply to your recent request for an official opinion which reads as follows:

"The undersigned has been requested by the County Superintendent of Schools, Saline County, Missouri, to obtain an opinion from your office on the following question:

"Senate Bill #307 as passed by the 64th General Assembly, relates to the creation of County Boards of Education, defines their powers and duties and provides for the making of plans for the re-organization of school districts etc.

"Section 11 of Senate Bill #304 as passed by the 64th General Assembly provides as follows:

"For the election of school directors and officers of the various school districts and providing for the delivering to the board directors of the enlarged school districts all property, records, books, papers etc. All funds in the hands of the County Treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the Treasurer of such enlarged district. The six board of directors of one enlarged school district request the present County Treasurer to serve as treasurer of said enlarged district. Can the County Treasurer legally serve in his present capacity and also serve in the capacity as treasurer of such enlarged district if appointed or elected by the directors of such enlarged district whether it be without compensation or with compensation?"

The question posed in the request for an opinion presents the fact of a county treasurer desiring to take on the additional duties of treasurer of a school district operating under the general school law and more particularly under the statutes contained in Article 5, Chapter 72, R. S. Mo. 1939, as amended. A review of the 1945 Constitution of Missouri does not disclose any provision contained therein which would prevent a county treasurer from performing the additional duties imposed by law on treasurers of school districts. The law governing county treasurers will be examined to discover any prohibition which may be contained therein against such a dual capacity.

Section 13799, R. S. Mo. 1939, contained in the law relating to county treasurers, their duties and liabilities, presents the only statutory mandate disclosing what persons are ineligible to serve as county treasurers. This section reads as follows:

"No sheriff, marshal, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

In the case of *State ex inf. Noblet ex rel. McDonald v. Moore*, 152 S.W. (2d) 86, 347 Mo. 1170, the Supreme Court of Missouri disclosed the liberality of construction to be accorded the statute just quoted in the following language found at 347 Mo., 1.c. 1173:

" * * * It should be noted that when the statute was enacted all the officers made ineligible for office of treasurer were at least county officers. At the outset we should observe that statutes prescribing requirements of eligibility to an elective office must be given a liberal construction. This is so because in our democratic form of government the greatest possible freedom of choice in the selection of their officers is a natural right of the people and this right must be zealously guarded by the courts. * * * "

In the opinion just quoted, above, the court had occasion to make reference to a previous opinion rendered in the case of *State ex rel. McAllister v. Dunn*, 277 Mo. 38, 209 S.W. 110, which was an action involving the section with which we are now dealing, Section 13799, R. S. Mo. 1939. The respondent therein had been a deputy collector of the City of St. Louis and while such, he was elected city treasurer. The court held

that the respondent was ineligible to the office of treasurer and ousted him on the sole ground that the purpose of the statute was, as stated by the court in 347 Mo. 1170, l.c. 1174:

" * * * to obviate the situation where 'one could be chosen treasurer and take and hold the office when, in all probability, public money in his hands in his former official capacity would have to be received and receipted for by himself in his new official capacity.' "

In the Dunn case, just referred to, the applicability of Section 13799, R. S. Mo. 1939, to officers of the City of St. Louis was conceded because of the classification of St. Louis as a county rather than a city. Since Section 13799, R. S. Mo. 1939, does not specifically refer to treasurers of school districts as being ineligible to serve as county treasurers, such statute is not to be construed as a prohibition against the dual capacity we are considering.

Although our present Constitution and statutes do not bar a county treasurer from serving, at the same time, as treasurer of a school district operating under the special provisions of Article 5, Chapter 72, R. S. Mo. 1939, we must look further and ascertain whether there is any common law incompatibility in holding these two positions. In the case of State ex rel. McGaughey v. Grayston, 163 S.W. (2d) 335, 349 Mo. 700, we find the common law rule alluded to as follows, at 349 Mo. l.c. 708:

"The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other. The rule against holding incompatible offices is founded upon principles of public policy. * * * "

Before discussing any incompatibility that may exist between the office of county treasurer and the position of

treasurer of a school district operating under the provisions of Article 5, Chapter 72, R. S. Mo. 1939, it is necessary to determine that the position of treasurer of such school district is a public office under the laws of this state and not merely an employment. In the case of State ex rel. Pickett v. Truman, 333 Mo. 1018, 64 S.W. (2d) 105, the Supreme Court of Missouri discussed the attributes of public office in the following language found at 333 Mo., l.c. 1021:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. It is the duty of his office and the nature of the duty that makes one an officer and not the extent of the authority, although designation by the law has some significance. * * * 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' * * * "

In the above case the court referred to State ex rel. v. Board of Commissioners (Ohio), 115 N.E. 919, 920, and spoke as follows at 333 Mo. l.c. 1022:

" * * * The Ohio decision states that it is no longer an open question in that state that to constitute a public office 'it is essential that certain independent public duties, a part of the sovereignty of the State, should be appointed to it by law.' Illustrative of what is meant by 'sovereignty of the State,' in the same opinion it is said: 'If specific statutory and independent duties are imposed upon an appointee

in relation to the exercise of the police powers of the State, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or State, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the State."

It is proper to denominate a school district as an arm of our state government since "a school district is a public corporation forming an integral part of the State and constituting that instrumentality of the State utilized by the State in discharging its constitutionally invoked governmental function of imparting knowledge to the State's youth" (Kansas City v. School District of Kansas City, 356 Mo. 364, 201 S.W. (2d) 930), and a school director has been held to be a public officer of a political subdivision of Missouri within the provisions of the anti-nepotism clause (Article XIV, Section 13) of Missouri's Constitution of 1875 (State ex rel. McKittrick v. Whittle, 333 Mo. 705, 63 S.W. (2d) 100). Although the anti-nepotism clause of Missouri's new Constitution of 1945, found at Section 6 of Article VII thereof, does not refer to a public officer or employee of a political subdivision of the State of Missouri, a deletion of the term "political subdivision" from the new clause should not be construed as a limitation when we are applying well recognized rules to determine who are public officers, but rather as referring to any public officer whose duties and responsibilities under the law cause him to be so classified.

Keeping in mind the principles above stated, we now turn to the statutes setting forth the qualifications, duties and responsibilities of a treasurer of a school district operating under the provisions of Article 5, Chapter 72, R. S. Mo. 1939, more commonly known as the six-director school law. It must be remembered that such a school district is also generally subject to the entire Missouri school law found in Chapter 72, R. S. Mo. 1939. Section 10470, Article 5, Chapter 72, R. S. Mo. 1939, as reenacted, Laws of Missouri, 1945, page 1650, provides:

"Within four days after the annual meeting, the board shall meet, the newly elected members, who shall be qualified by the taking

of the oath of office prescribed by Article VII, Section 11, of the Constitution of Missouri, and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs. A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor. When there is an equal division of the whole board upon any question, the county superintendent of schools, if requested by at least three members of the board, shall cast the deciding vote upon such question, and for the determination of such question shall be considered as a member of such board. The president and secretary, except as herein specified, shall perform the same duties and be subject to the same liabilities as the presidents and clerks of the school boards of other districts."

The above statute creates the position of treasurer of a six-director district, provides for his election by members of the boards of directors, requires that he be elected annually on July 15, permits him to be chosen from the membership of the board and provides when his compensation shall be paid to him. Section 10501, Article 5, Chapter 72, R. S. Mo. 1939, as re-enacted, Laws of Missouri, 1945, page 1654, provides that no member of any public school board of a city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that of the treasurer shall not exceed fifty dollars for any one year. This section provides a maximum limit on compensation to be paid the treasurer of a board of education in any city, town or village having less than twenty-five thousand inhabitants.

Section 10477, Article 5, Chapter 72, R. S. Mo. 1939, provides that the treasurer shall give a bond to the State of Missouri conditioned that he will render a faithful and just account of all money that may come into his hands as such treasurer, and otherwise perform the duties of his office according to law. After giving such bond the treasurer becomes the custodian of all school moneys derived from taxation for school purposes in the school district until paid out on the order of the board. It should be noted here that this section refers to duties of his "office." This section also authorizes any freeholder to bring suit on such bond in the name of the State of Missouri, at the relation and to the use of the proper school district.

In the case of State ex rel. School District of Sedalia v. Harter, 87 S.W. 941, 188 Mo. 516, the Supreme Court of Missouri was reviewing a suit on the bond of a treasurer of a six-director school district. A demurrer to the action was sustained and the plaintiff appealed. The point on which the decision rested was whether or not the action was barred by Section 4274, R. S. Mo. 1899, now Section 1015, R. S. Mo. 1939, which prescribes what actions must be brought within three years after the cause of action accrues. The section now reads as follows:

"Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

Defendants in the Harter case contended that under the statute just quoted, the action was barred. Plaintiff contended that the section did not apply since, as he stated, a treasurer of a school district was not an officer within the meaning of that section nor in the legal acceptation of that term. In ruling the point the court used the following language, found at 188 Mo., l.c. 528:

" * * * 'A public office is defined to be the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an

individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' * * *

Continuing, the court spoke as follows:

"Tested by these rules a treasurer of a school district must be held to perform 'some portion of the sovereign functions of the government to be exercised by him for the benefit of the public,' and must therefore be a 'public officer' within the meaning of the law. * * *

It is not deemed necessary to cite additional authority to support the view that a treasurer of a six-director school district is a public officer.

County treasurers have numerous duties imposed by statute in relation to schools, and those duties are to be found outlined in various sections of Chapter 72, R. S. Mo. 1939, Missouri's school law. The close relationship between the office of county treasurer and treasurer of a six-director school district is readily apparent when we consider that the latter office was carved out of the office of county treasurer, which officer was the custodian of all school moneys until the act relating to city, town and village schools created a new office, and gave a portion of the county treasurer's official duties to the treasurer of the school district.

We recognize the statement of the court in *State ex rel. McAllister v. Dunn*, supra, heretofore quoted in this opinion, as a salutary rule by which to measure the degree of incompatibility of public offices, and a rule which will be applied in this instance to determine the right of a county treasurer to also serve as a treasurer of a six-director school district. In other words, if serving in this dual capacity will require the officer to receive public funds in one capacity and disburse a portion of those same funds to himself in another capacity, with the consequent duty to issue a receipt to himself in one capacity in order to acquit himself in the other capacity, his offices are wholly incompatible and he will not be permitted to serve in the dual capacity.

Notwithstanding the numerous duties of county treasurers in relation to school funds, we need only to point out the manner in which school taxes are collected and disbursed to a six-director school district in order to disclose incompatibility of the offices

with which we are dealing. Section 10398, R. S. Mo. 1939, makes it the duty of the county clerk to take a receipt from the county collector for the school taxes by him placed on the general taxbooks, and the collector is required to then proceed to collect the same in the same manner as state and county taxes are or may be collected; and the collector is required to pay over monthly to the county treasurer all such taxes collected and take his receipt therefor. Section 10400, R. S. Mo. 1939, as reenacted, Laws of Missouri, 1945, page 1708, provides that the county treasurer, in each county shall be the custodian of all moneys for school purposes belonging to the different school districts, until paid out on warrants duly issued by order of the board of directors of such school districts or to the treasurer of some town, city or consolidated school district, except in counties having adopted the township organization law, in which counties the township trustee is designated as a custodian of all school moneys belonging to the township and is also subject to corresponding duties as a county treasurer. Section 10479, Article 5, Chapter 72, R. S. Mo. 1939, provides that whenever any state or county school money apportioned to any town, city or consolidated school district shall have been paid to any county or township treasurer, as now provided by law, the same shall, on the application of the treasurer of the town, city or consolidated school district, be paid over to him by the county or township treasurer; and it further provides that the receipt of any such school district treasurer for such moneys shall be a lawful voucher for the disposition of such money by the county or township treasurer and shall be accepted as such by the county court or other body having authority by law to make settlements with the county or township treasurer. A consideration of the three statutes just enumerated and outlined clearly discloses that a county treasurer could not at the same time serve as treasurer of a six-director school district without being compelled to disburse school funds in his possession to himself while serving also in the capacity of treasurer of the school district. As outlined above the very nature of his duties and the manner in which he is compelled to carry them out relieves us of any doubt as to his right to enjoy the dual capacity. His duties are clearly incompatible.

CONCLUSION

It is the opinion of this office that the duties of a county or township treasurer are clearly incompatible with

Hon. Ralph H. Duggins

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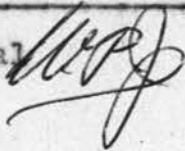
those of a treasurer of a six-director school district operating under the provisions of Article 5, Chapter 72, R. S. Mo. 1939, and it would be against the established public policy of this state to allow an officer to serve in such a dual capacity.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

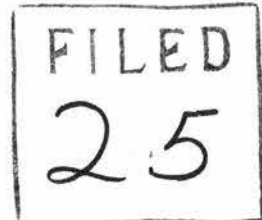


JLO'M:VLM

THE STATE BOARD OF
CHIROPRACTIC EXAMINERS:

The State Board of Chiropractic
Examiners of Missouri does not
have the power to subpoena
witnesses.

July 20, 1950



Doctor S. J. Durham, Secretary
State Board of Chiropractic Examiners
204 1/2 East High Street
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your recent request for an
official opinion. You thus state your request:

"This office would very much appreciate
an official opinion on the following
question:

"Does the State Board of Chiropractic
Examiners have the power under the
Missouri Statutes to compel witnesses
to appear at a meeting of the Board
assembled for the purpose of consider-
ing the revocation of a practitioner's
license? If it does have this power,
by what method can these witnesses be
compelled to appear?"

The powers of the State Board of Chiropractic Examiners are
set forth in Chapter 63, R. S. Missouri, 1939. Section 10053 of
the above chapter sets forth in general the powers and duties of
the Board. This section states that "The president and secretary
shall have power to administer oaths." It makes no further mention
of any other powers relating to witnesses. Section 10053 was re-
pealed by House Revision Bill No. 2071 of the 65th General Assembly
of Missouri and now appears as Section 331.10. The same powers of
the president and secretary to administer oaths is maintained in
Section 331.10.

Doctor S. J. Durham

Section 10058, R. S. Missouri, 1939, gives the Board power to investigate charges and to revoke licenses. That section stands unamended and reads as follows:

"It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this state has been issued. Upon complaint being made to the board it shall investigate and if it deems probable cause exists for the complaint, shall furnish a copy of the complaint to the accused by registered mail, together with a notice of the time and place for the hearing of same, which shall not be less than thirty days after the depositing of said communication in the United States mail. The accused shall have an opportunity to be heard to answer such charges in person, or by attorney, and if upon such hearing it shall be proven beyond a reasonable doubt to the board, that the accused is guilty of such immoral or illegal action, or is addicted, or has been addicted, during a period of the past six months to the use of narcotics, drugs, or intoxicating liquors, or in any way guilty of deception or fraud in the practice of chiropractic, or of shielding anyone in immoral practices, criminal or illegal actions, or is guilty of any criminal or illegal actions, the board shall revoke his license."

It will be observed that nothing in the above section gives to the Board the power to subpoena witnesses, nor is this power given to the Board of Chiropractic Examiners elsewhere in the laws of Missouri either specifically or by implication. The Laws of Missouri do specifically give to certain boards, commissions, and departments of the State Government of Missouri this power to subpoena witnesses. In the granting of power to other boards and commissions, the Laws of Missouri omit any reference to the power of subpoenaing witnesses. The Board of Chiropractic Examiners is one in which this power is omitted. It is obvious that the power cannot be exercised by a board or commission unless it is given that power by law, either specifically or by implication.

42 Am. Jur. Sec. 88 says, in part:

"The power of administrative authorities to compel the attendance and testimony of witnesses

Doctor S. J. Durham

and the production of evidence is dependent upon statutes. * * *

42 Am. Jur. Sec. 33, in part, says:

"Although administrative officers have not inherent power to require the attendance of witnesses before them and to put them under oath and require them to testify, once they are before them, they are frequently given this power by statute. * * *

Section 10608.7 R. S. Missouri, 1939, states:

"There is hereby created and established a division of the state department of education to be known as the division of registration and examination. The following boards of this state are hereby assigned, deemed and considered to be boards of said division:

"Missouri State Board of Accountancy
State Board of Registration for Architects and
Professional Engineers
State Board of Barber Examiners
State Board of Chiropody
State Board of Chiropractic Examiners
State Board of Cosmetology
Missouri Dental Board
State Board of Embalming
State Board of Medical Examiners
State Board of Nurse Examiners
State Board of Optometry
State Board of Osteopathic Registration and
Examination
Board of Pharmacy
Missouri Real Estate Commission
Veterinary Examining Board."

Section 10608.8 R. S. Missouri, 1939, states:

"Each board herein mentioned shall function under such statutes, rules and regulations that now exist which govern each respective board, and nothing herein contained shall be construed to deprive any of the above boards from exercising such right or authority as each board now has at this time."

Doctor S. J. Durham

CONCLUSION

It is the conclusion of this department that the Board of Chiropractic Examiners of the State of Missouri does not have the power to subpoena witnesses.

Respectfully submitted,

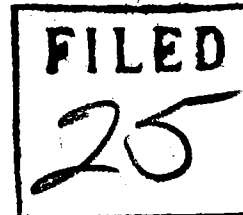
HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

OFFICERS) Calling of County Collector, who is a member of
) the reserve, to active duty, does not cause vacancy
) in office.

August 29, 1950



Honorable Ralph H. Duggins
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"This office desires the opinion of the Attorney General's office. The situation involves the following facts:

"Mr. Marcellus A. Gauldin, the present Collector of Saline County, Missouri was nominated at the August Primary as the Democratic candidate for this office to succeed himself. Nomination in Saline County is tantamount to election for this office. Mr. Gauldin is a member of the Naval Reserve but is not attached to any organized unit. He has just received directions to report for a physical examination to determine his fitness for active duty. He has received no orders as yet to report for active duty. Naturally he desires to make available to himself and his family the fees from the office in the event he is called into active service during his term of office, if there is any way possible for him to do so.

Honorable Ralph H. Duggins

"The opinion this office requests therefore is several fold, to-wit:

"(1) In the event a Collector is called to active duty in the armed forces, what procedure is followed with regard to the duties of the Collector.

"(2) Is his resignation mandatory.

"(3) In the event there is no resignation does the Collector designate an acting Collector or in the alternative does the Governor, acting upon recommendation of the County Committee, make any appointment.

"(4) Is any certain action necessary on the part of the collector to make effective his wish to retain control of the office during the period he is on active duty.

"We will appreciate your consideration of this matter and an opinion at your early convenience."

During the last war two cases were presented to the Missouri Supreme Court involving the question of the effect of induction into the armed forces of the United States upon a person's holding of public office. The first case was State ex rel. McGaughey v. Grayston, 163 S.W. (2d) 335. In that case Judge Ray E. Watson of the circuit court of Jasper County had been called into active service as a member of the Missouri National Guard. A special judge had been elected to hold court in his absence. Objection was raised to the jurisdiction to try the case on the ground that a special judge could not function under such circumstances, and a writ of prohibition was sought in the Supreme Court to prevent the special judge's acting. Relator's contention was set out by the court at 163 S.W. (2d) 1.c. 337, as follows:

"Relator contends that Judge Watson-as a National Guard Colonel in Federal ser-

Honorable Ralph H. Duggins

ice accepted 'an office of profit under the United States' while holding a State office which is forbidden by our Constitution. As a result, he insists, Judge Watson has forfeited his judgeship under the rule that the acceptance of a second office which is forbidden or incompatible to the office already held ipso facto vacates the first office. Therefore, if there is a vacancy in the office of circuit judge as distinguished from an absence, a special judge has no authority to act and his jurisdiction may be properly challenged."

The court concluded that Section 4 of Article 14 of the Constitution of 1875, now Section 9 of Article VII, Constitution of 1945, which prohibits a person's holding an office of profit under the United States from holding any office or profit under this state "was never intended to apply and does not now apply to the militiaman who enters the service of his country in time of emergency or war." (163 S.W. (2d) 1. c. 337.)

The court also considered the question of whether or not there was any common law incompatibility in holding both offices there involved and concluded that there was no legal incompatibility in holding both offices. The court further concluded that Section 18 of Article II of the Constitution of 1875 which required a person holding an office under the laws of this state to personally devote his time to the performance of the duties of such office did not prevent the judge's continuing to hold his office while serving in the armed forces. The court stated at 163 S.W. (2d) 1. c. 341 that this provision "was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the officer."

In the case of State ex inf. McKittrick v. Wilson, 166 S.W. (2d) 499, the clerk of the circuit court of Henry County had been inducted under the Selective Service Act into the Army of the United States. The question involved in the case was whether or not his induction under the Selective Service Act resulting in his inability personally to perform the duties of his office caused the clerk automatically to forfeit his office. The court concluded that induction did not cause

Honorable Ralph H. Duggins

the office to become vacant. The court stated, "We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the Army. Therefore, the office was not vacant and the appointment of respondent was unauthorized." (166 S.W. (2d) 1. c. 502.)

We feel that the decisions in the foregoing cases may be relied upon in answering your questions. Your first question is "What procedure is followed with regard to the duties of the Collector in the event of his being called into active duty in the armed forces?" In the Wilson case, supra, the circuit clerk had in accordance with the statute appointed a deputy to carry out the duties of his office during his absence. Section 11067, R. S. Missouri, 1939, authorizes a county collector to appoint deputies. Under the holding of the Wilson case, we believe that the appointment of a deputy or deputies to perform the duties of the office would be all that would be necessary.

Your second question is "Whether or not the resignation of the collector is mandatory upon his being called to active duty." There is no statutory or constitutional provisions making resignation mandatory under such circumstances.

Your third question is "Whether or not in the event there is no resignation, does the collector designate an acting collector or does the Governor, acting upon recommendation of the county committee, make any appointment." As for the first part of this question, there is no provision for the collector's designating an acting collector. However, as we have pointed out in answer to your first question, he may appoint a deputy to perform the duties of his office. As for action on the part of the Governor, under the holding of the Wilson case there is no vacancy existing in the office. The Governor is authorized under Section 11509, R. S. Missouri, 1939, to make an appointment to fill a vacancy in the office of county collector. However, no vacancy exists, and, therefore, the Governor is not authorized to act in the circumstances.

Your fourth question is "Whether or not any certain action is necessary on the part of the collector to make

Honorable Ralph H. Duggins

effective his wish to retain the office during the period that he is on active duty. There is nothing which the collector would be required to do other than designate a deputy to carry out the functions of the office.


CONCLUSION

Therefore, it is the opinion of this office that when a county collector, who is a member of the Naval Reserve, is called into active duty, he may designate a deputy to perform his duties in his absence on active duty; that the resignation of the collector is not mandatory; that in the event of no resignation the collector does not designate an acting collector but merely a deputy, and the Governor does not make any appointment inasmuch as no vacancy exists in the office, and that no certain action is necessary on the part of the collector to make effective his wish to retain the office while on active duty.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

RRW/feh

DIVISION OF INDUSTRIAL
INSPECTION:

To be subject to pay an inspection
fee a business must fall within one
of the classes enumerated by Missouri
law as being subject to inspection.

September 19, 1950



Mr. L. L. Duncan, Director
Division of Industrial Inspection
Department of Labor and Industrial
Relations
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your recent request for an
official opinion. You thus state your request:

"We have received a communication from the
Missouri Pacific Railroad Company, Kansas
City, Missouri, regarding the payment of an
inspection fee. A copy of their letter is
attached.

"They have referred to Sections 10179 and
10180, Revised Statutes of Missouri, 1939,
which provides for inspections and inspection
fees. As we understand their letter, since
the offices they occupy in the Railway Ex-
change Building is leased from the Yarco
Realty Company, they do not feel they are
obligated to pay the inspection fee.

"We would greatly appreciate a ruling from
your office on this matter."

The powers and duties of the State Commissioner of Labor and
Industrial Inspection, and his deputies, is set forth in Chapter 68,
Article 4, Section 10179, Mo. R. S. 1939. We quote the following
portion of that section:

"The state commissioner of labor and industrial
inspection may divide the state into districts,

Mr. L. L. Duncan
Director
Division of Industrial
Inspection

assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. * * *

(Underscoring ours.)

It will be observed from the above that the places subject to inspection are enumerated, and that one of the places enumerated is "office buildings." The question which we have to decide here is whether, when the statute lists "office buildings" as one of the places to be inspected, it also includes various parts of the office building which have been leased to various persons, companies and corporations. In regard to this we would call your attention to the following portion of an opinion rendered by this office on July 10, 1933, to Mary Edna Cruzen, Labor and Industrial Commissioner, Jefferson City, Missouri, in response to her inquiry as to whether the Department of Labor and Industrial Inspection had authority to inspect different offices in an office building:

"Your first and second inquiries above refer to the inspection of office buildings. You desire interpretation of office buildings, and information as to whether the inspection of office buildings includes the right to inspect the various offices which go to make up the building.

"In answer to your inquiry, it is the opinion of this Department that the term "office building," as used in Section 13218 R. S. Mo. 1929 above, means an inspection of the building alone, and that the fee therefor should be charged on the basis of the number of employees employed by the company, individual, or individuals owning the office building. You may not take into consideration in fixing the fee for this inspection the total number of employees employed by the various tenants who rent office space in an office building.

Mr. L. L. Duncan, Director
Division of Industrial
Inspection

"You inquire whether you have a right to inspect the different offices located in the building. It is the opinion of this department that you do have the right to inspect the different offices in an office building where the businesses carried on in the offices are those named in Section 13218. (Section 10179 Mo. R. S. 1939). When the offices in the office building are leased, the space rented belong to the lessee for the period of the lease, and the owner of the building usually has no jurisdiction over it. The space rented belongs to the lessee and becomes separate and distinct from the building itself. Any number of different businesses may and naturally are carried on in the various offices of the large office buildings and when the businesses are those defined in Section 13218, (Section 10179 Mo. R. S. 1939), they may be inspected the same as if they occupied an individual building of their own."

It seems clear that when the statutes lists "office buildings" as being subject to inspection, it means the building as a whole. This impression is strengthened by the fact that various statutes in Missouri set up various requirements for public buildings. For example, Section 10185 R. S. Missouri, 1939, sets forth regulations regarding hatchways, elevators, and wellholes in public buildings. Section 10186 sets forth regulations regarding fire escapes. Various other sections set up requirements regarding ventilation, sanitation and other similar matters which are clearly under the control of the owner and manager of an office building. It would seem therefore, as we said above, that an "office building" as a whole, is subject to inspection with respect to such matters as elevators, trapdoors, fire escapes, et cetera.

It may be observed here, that the term "office building" does not exclusively mean a building which contains nothing but offices as the term "office building" is commonly understood. The term is broader than that. In the case of Pritchard v. National Protective Insurance Company, 200 S. W. (2d) 540, the court determined that the building there in question was an "office building" although a number of rooms in the building were rented out to private individuals as living quarters only. Numerous other cases held likewise. The question before us now is whether, when a portion of an "office building" as defined above is rented or leased to an individual, company, or corporation, that portion is subject to a separate and different inspection than that to which the "office building" is subject, or in other words, whether the inspection of the "office building" excludes any portion of the office building which is leased or rented from inspection. We do not believe that it does, if in that portion which is leased or rented there is carried on any one of the businesses listed in Section 10179 as being subject to inspection. Our reason

Mr. L. L. Duncan, Director
Division of Industrial
Inspection

for so believing is based upon the fact that, as stated in the Cruzen opinion quoted above, when property is leased or rented, it passes, for the term of the lease, beyond the control of the lessor, and he should not therefore be held accountable for conditions upon the premises over which he has no control. In the case of Marden v. Radford, 84 S. W. (2d) 947, 1.c. 954, the court stated:

"The relation of landlord and tenant may be defined in general terms as that which arise from a contract by which one person occupies the real property of another with his permission and in subordination to his rights; the occupant being known as the tenant and the person in subordination to whom he occupies as the landlord.

"The authorities agree, as essential to such relationship, that there must be a reversion in the landlord; the creation of an estate in the tenant, at will or for a term less than that for which the landlord holds the same; the transfer of the exclusive possession and control of the premises to the tenant; and, generally speaking, a contract, either express or implied, between the parties."

It is the opinion of this department therefore that space leased in an office building is not exempt from an inspection separate from the inspection of the office building in which the rented portion is located merely because of the fact that this portion is leased.

The question before us in the instant case is whether the offices of the Missouri Pacific Railroad Company, which are leased offices in an office building, are subject to inspection.

Your letter of inquiry does not fully reveal the operations carried on. An investigation by us shows that these offices are used for the purpose of carrying on only a part of the business of the Missouri Pacific Railroad Company, and that this particular part consists of making audits, making up payrolls, and the carrying on of correspondence relating to the business of this concern, but that no tickets are sold in or through these particular offices. This being the case, it is our opinion that these offices are not subject to inspection because of the fact that they do not fall within any one of the classes of places enumerated in Section 10179 as being subject to inspection.

Mr. L. L. Duncan
Director
Division of Industrial
Inspection

CONCLUSION

It is the opinion of this department that the offices of the Missouri Pacific Railroad Company located in the Railway Exchange Building in Kansas City, Missouri, are not liable to pay an inspection fee to the Division of Industrial Inspection because of the fact that they do not come within any of the classes of places subject to inspection.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS) Kansas City Board of Election Commissioners not required
) to have clerks canvass for special election for referendum
) on gasoline tax increase.

January 18, 1950

1/26/50

Honorable Ray A. Edlund
Chairman, Bd. of Election Commissioners
County Court House
Kansas City 6, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"Do we have to have, by law, a Clerk's Canvass in connection with this election? We would rather not have one, as the additional cost would be \$20,000."

Section 53 of Article III of the Constitution of Missouri provides as follows:

"The total vote for governor at the general election last preceding the filing of any initiative or referendum petition shall be used to determine the number of legal voters necessary to sign the petition. In submitting the same to the people the secretary of state and all other officers shall be governed by general laws."

In the case of State ex rel. v. Westhues, 9 S.W. (2d) 612, the Supreme Court in deciding the question of whether or not under a provision of the Constitution of 1875, reading as follows:

"Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

Honorable Ray A. Edlund

referred laws had to be published in newspapers before the election at which such laws were to be voted upon said at l. c. 618:

"As general laws, in force when section 57, art. 4, was adopted, provided for publication of proposals to amend the Constitution in a newspaper in each county, such requirement by express reference became applicable to the submission of initiative and referendum measures, and they too were required to be published in a newspaper in each county, and such requirement is still in force and effect."

From the holding in this case it is clear that the question of whether or not a canvass is required depends on whether the general laws so require. Section 12121, R. S. Missouri, 1939, provides as follows:

"Immediately after the close of registration before each election preceding which a canvass is required, the board shall have verification lists prepared for each precinct. Such list shall have the names and addresses of all voters registered in the precinct arranged in the same order as the precinct registers. A canvass shall be made before each general state and county election, each state and county primary, each general city election, and each election at which any proposal by the city or the county for increase of indebtedness is to be submitted unless held with a general county or state election."

It will be noted that there is no requirement in this section that a canvass be held before a special referendum election. Sections 12097 (a), Laws of Missouri, 1943, page 542, provides as follows:

"The Board of Election Commissioners, in addition to all other powers conferred upon it by this Article, shall have the power and authority, in its discretion, in any special constitutional election for the election of delegates to a constitutional convention, or any election called for the purpose of submitting the issue of adoption of a Constitutional Amendment or Amendments, to consolidate two or more precincts, and

Honorable Ray A. Edlund

to use one set of judges and clerks in such consolidated voting area and to dispense with a clerks' canvass and the printing of registration lists for such special election, and the Board of Election Commissioners shall have the power and authority to substitute the last printed registration list, corrected to the final date of registration and transfer for such special election, for the registers at any polling place, providing that following any such election in which such registration lists are so substituted, the Board of Election Commissioners shall cause the voting record of all persons voting in such election to be entered upon the registration affidavits of all such persons."

Since Section 12097 (a), supra, is the general law relating to submission of constitutional amendments for a special election, we believe such section to be applicable to a special referendum election.

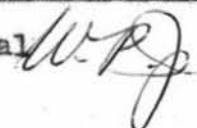
CONCLUSION

It is the opinion of this department that the board of election commissioners is not required to order a canvass before the special referendum election to be held April 4, 1950.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General 

CBB/feh

SALARIES: Salary of County Clerk elected at November 1950 election is determined by 1950 decennial census.

March 31, 1950

4/1/50
FILED
26

Honorable Walter A. Eggers
Judge of the Probate Court
Perryville, Missouri

Dear Judge Eggers:

This department is in receipt of your recent request for an official opinion upon the following matter:

"Assuming that a County Clerk is elected at the November election of 1950 and assuming further that the present salary is based on a population in excess of 15,000, now then let us assume that the 1950 census would show a population of only 14,000, when would the county clerks salary be reduced? Would it be effective beginning with the new term Jan. 1, 1951 or would the newly elected county clerk continue to receive the former salary during his term of office?"

We take note of the fact that Perry County is a county of the fourth class.

The salary of the county clerk in counties of the fourth class is fixed by Section 1, House Committee Substitute for House Bill No. 768, Laws of Missouri, 1945, page 1524, approved March 9, 1946. That section reads:

"The clerk of the county court in counties of the fourth class shall receive for their services annually the following sums: In counties having a population of less than 7,500 the sum of \$1000; in counties having a population of 7,500 and less than 10,000 the sum of \$1100; in counties having a population of 10,000 and less than 11,500 the sum of \$1250; in counties having a population of 11,500 and less than 12,500 the sum of \$1300; in counties having a population of 12,500 and less than 15,000 the sum of \$1500; in counties having a

Hon. Walter A. Eggers

population of 15,000 and less than 17,500 the sum of \$1700; and in counties having a population of 17,500 or more the sum of \$1900."

House Bill No. 876, approved March 15, 1946, Laws of Missouri, 1945, pages 1550 and 1551, Section 13430, states:

"The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants; provided that for the purposes of this section, the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1 of each tenth year after 1951."

A county clerk elected at the November election in 1950 would assume office January 1, 1951, which is the effective date of the 1950 decennial census. Therefore, for his term, his salary would be determined by the population of Perry County as that population is shown to be by the 1950 decennial census.

CONCLUSION

It is the opinion of this office that the salary of a county clerk in a fourth class county, who is elected at the November election of 1950, will be determined by the population of that county as that population is shown to be by the 1950 decennial census.

Respectfully submitted,

APPROVED:

HUGH P. WILLIAMSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

HPW:VLM

January 16, 1950

FILED NO. 27



Honorable Clarence Evans
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"We have had many requests from counties asking for information regarding tangible personal property. Where there has been a failure to assess for a year, or years, can the assessor go back and place these assessments on the books, and if so, for how many years?

"Under House Bill 265, Laws of 1947, Section 15, Subsection 8, it requires the Tax Commission to place upon the assessment rolls at any time during the year omitted property which may be discovered to have, for any reason, escaped assessment and taxation. This, of course, covers only the current year."

We are enclosing an official opinion of this department rendered under date of June 25, 1945, to Horace T. Robinson, which, we believe, correctly holds in paragraphs 1 and 2 that tangible personal property omitted from the assessment rolls may be added by the County Board of Equalization or by the State Tax Commission. Section 11006, Laws of Missouri, 1945, page 1775, provides as follows:

"The county Board of Equalization, in regular session, shall have authority to assess and equalize the value of any property that may have been omitted from the assessor's books then under

Honorable Clarence Evans

examination by said board and in case the board shall add any property to the assessor's books, it shall cause notice in writing to be served upon the owner of such property, stating the kind and class of property and the value fixed thereon by said board, and naming the time and place, not less than five days thereafter, when and where such owner may appear before the board and show cause why said assessment should not be made. At the time fixed, the board shall again meet and give opportunity to the taxpayer to be heard in regard to his assessment, and may change or alter the same upon being shown by the owner that the assessment was erroneous or improperly made; otherwise, the property and the valuation, as fixed by the board, shall be extended upon the assessor's books, as in case of other property. The notice shall be signed by the clerk of the county court, and shall be served by mail and it shall be the duty of the prosecuting attorney, or county counselor, if any, when called upon by the board of equalization, to represent the county in any such proceedings. In case of the assessment of real estate belonging to non-residents a notice containing the action of the board of equalization shall be mailed to the owner, administrator or executor to the last known address. This notice shall state the kind and class of property and the value fixed thereon by said board, and naming the time and place, not less than five days thereafter when and where such owner, administrator, or executor may appear before the board and show cause why such assessment should not be made. Provided, that in any case where the residence of the owner, administrator or executor is unknown, publication shall be made of the additional assessment in one issue of a newspaper of general circulation which is published at least once a week within the county."

Honorable Clarence Evans

In the case of State ex rel. v. Pulliam, 233 Mo. 229, the Supreme Court of Missouri said in speaking of what is now Section 11006, supra, at l. c. 234:

"The attempted addition of property for 1904 was invalid for the reason that neither in the Act of 1903, nor elsewhere, is there power given to the board of equalization to add for assessment property omitted for any year prior to the then current year. The Act of 1903 provides that the board shall have power to 'assess and equalize the value of any property that may have been omitted from the assessor's books then under examination by said board.' This plainly refers to the books for the current year only, as they are the only ones 'under examination by said board.'"

Since Section 11006 now provides that the County Board of Equalization has authority only to assess and equalize the value of any property that may have been omitted from the assessor's books, then under examination by said board, we believe that the County Board of Equalization may place omitted property on the assessment rolls only for the year in which the assessment rolls are under consideration by the board.

Section 15, Laws of Missouri, 1947, Volume I, page 548, provides in part as follows:

"It shall be the duty of the State Tax Commission and the commissioners shall have authority to perform all duties enumerated in this section and such other duties as may be provided by law:

* * * * *

"(8) To cause to be placed upon the assessment rolls at any time during the year omitted property which may be discovered to have, for any reason, escaped assessment and taxation, and to correct any errors that may be found on the assessment rolls and to cause the proper entry to be made thereon."

Honorable Clarence Evans

Section 16, Laws of Missouri, 1947, Volume II, page 436, provides in part as follows:

"After the various assessment rolls required to be made by law shall have been passed upon by the several boards of Equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the Commission, or by any member or duly authorized agent or representative thereof. In case it shall appear to the Commission after such investigation, or be made to appear to said Commission by written complaint of any taxpayer, who has previously appealed to the local Board of Equalization, that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said Commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the Commission shall deem most convenient for the hearing herein provided. * * * As to the property not upon the assessment roll, the county clerk, upon order of the State Tax Commission, acting in said review, shall place the same upon said assessment roll by proper description and shall place thereafter in the proper column the value required by law for the assessment of said property. * * *"

We believe it to be obvious from the provisions of subsection 8 of Section 15, Laws of Missouri, 1947, Volume I, page 548, as well as the provisions of Section 16 of Laws of Missouri, 1947, Volume II, page 436, referring to the assessment rolls which have been passed upon the the County Boards of Equalization that the State Tax Commission has power

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to place on the assessment rolls omitted tangible personal property only for the year for which the Commission is reviewing such assessment rolls.

CONCLUSION

It is the opinion of this department that tangible personal property, which has been omitted from the assessment rolls, may be placed thereon by the County Board of Equalization or by the State Tax Commission only during the year when the County Board of Equalization or the State Tax Commission is reviewing the assessment rolls.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

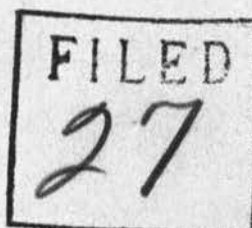
APPROVED:

J. E. TAYLOR
Attorney General

FRANCHISE TAX) New York Mutual Savings Bank pays Twenty-five
BANKS) Dollar (\$25.00) annual fee.

March 21, 1950

3/22/50



Honorable Clarence Evans
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"We have a request concerning the liability for corporation franchise tax of a New York Mutual Savings Bank.

"The bank in question is the New York Mutual Banking Corporation which is applying for a license to do business in Missouri, stating that they have in mind purchasing Government Housing Loans and that one of the requirements in the purchase of such securities is that a service agent living within fifty miles of the project be retained. It is our understanding that this Savings Bank is applying to the Department of Finance for the permission to operate in Missouri for the purpose above outlined.

"We have checked the corporation franchise tax laws and the only section we can find that would cover this is Section 140 of House Bill No. 540, Laws of 1945.

"We are enclosing statement covering the corporate structure of a New York Savings Bank and will appreciate your advising us as to the liability for corporation franchise tax."

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The statement concerning the corporate structure of New York Savings Bank is, in part, as follows:

"You will also wish to know the nature of the corporate organization of a New York Savings Bank. Such savings banks are mutual corporations, entirely without capital stock. They are banking corporations pursuant to New York Law and subject to supervision of our Banking Department. Certain of such savings banks, including our clients, were originally incorporated many years ago by special act of the legislature, but all such legislative charters contained reserve power to amend, and pursuant to such reserve power, the New York legislature long ago amended all such charters to conform to the article of our Banking Law relating to savings banks, * * *"

Section 3 of Article X of the Constitution of New York contains the following provision:

"The legislature shall, by general law, conform all charters of savings banks, or institutions for savings, to a uniformity of powers, rights and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law, and to such amendments as may be made thereto. And, no such corporation shall have any capital stock, * * *"

(Underscoring ours.)

Section 138 of the Missouri General and Business Corporation Law, re-enacted Laws of 1945, page 711, provides in part:

"Every corporation organized under any laws of this state and every foreign

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corporation engaged in business in this state and having no shares shall make a report in writing to the State Tax Commission, annually, on or before the first day of March, in such form as said commission may prescribe. * * *

(Underscoring ours.)

Section 140 of said act, re-enacted Sixty-fifth General Assembly, Senate Bill No. 124, provides in part as follows:

"Upon the filing of the report provided for in Sections 138 and 139 of the general and business corporation act of Missouri, said commission shall certify to the Director of Revenue on or before August 1st of every year for collection, as herein provided, a fee of twenty-five dollars for every corporation organized as a mutual insurance corporation not having shares, or any other corporation not organized strictly for religious, charitable or educational purposes and having no shares or of a company or association organized to transact business of life or accident insurance on the assessment plan for the purpose of mutual protection and benefit to its members and the payment of stipulated sums of money to the family, heirs, executors, administrators or assigns of the deceased member thereof. * * *"

If a New York Mutual Savings Bank does business in Missouri, it, having no shares, would be required to make the report prescribed by Section 138 of the General and Business Corporation Act, and to pay the Twenty-five Dollar (\$25.00) annual fee prescribed by Section 140. There is no provision for imposing a franchise tax upon such corporation on any other basis.

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CONCLUSION

Therefore, it is the opinion of this department that a New York Mutual Savings Bank, which does business in Missouri, is required to make the report prescribed by Section 138 of the General and Business Corporation Act of Missouri, and to pay a Twenty-five Dollar (\$25.00) annual fee prescribed by Section 140 of said act.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General

RRW/feh

TAXATION) State Tax Commission does not assess pipe line which is not
) a public utility.

April 1, 1950

4/5/50



Honorable Clarence Evans
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department,
which request is as follows:

"On our visits to the counties last fall our attention was called by some local assessors to a pipe line owned and operated by the Standard Oil Company, and running from the refinery at Sugar Creek, Missouri, northwestwardly through Jackson, Clay, Clinton, Buchanan, Andrew, Atchison and Nodaway counties in Missouri, and from there into Iowa, Nebraska, South Dakota, etc. The assessors were at a loss as to why this pipe line was not being assessed by the State Tax Commission, and we promised to look into the matter for them.

"We have inquired of the Standard Oil Company regarding this pipe line, and the correspondence is attached hereto. We will appreciate your returning this correspondence when the opinion has been written. There is some doubt in our minds regarding the assessment of this pipe line by us, and we have checked the records of the Office of Secretary of State, but find no separate pipe line corporation. We are assured of the fact that this pipe line is part of the main business of the refinery, and while it is definitely a pipe line, the question arises as to whether or not it is a public utility, and where it should be assessed.

"We feel that the correspondence covers the case sufficiently, and we will appreciate your advice regarding the assessment of this and other pipe line companies."

Honorable Clarence Evans

The attached correspondence from the Standard Oil Company states that the pipe line in question was constructed and is used for transporting completely refined petroleum products from the company's Sugar Creek refinery to its plants and markets in other states. The line is used exclusively by the company for the transportation of its products and is not a common carrier.

Section 11295, Laws of 1945, page 1852, provides:

"All bridges over streams dividing this State from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course of construction, or which shall hereafter be constructed, and all property, real and tangible personal, owned by telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies and express companies shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, county boards of equalization and the State Tax Commission are hereby required to perform the same duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization and State Tax Commission have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other authorized officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, pipe line companies, or express company or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric

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transmission lines, pipe line companies, or express companies in like manner as the president, or other authorized officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property. On or before the first day of May in the year 1946 and each year thereafter the president or other authorized officer of each such company shall furnish the State Tax Commission a statement, duly subscribed and sworn to by said president or other authorized officer, showing the full amount of all real and tangible personal property owned by each such company on January 1st of the year in which the report is due. In case the report from any such company, as required by this section, is not received by May 1st of the year in which it is due the State Tax Commission may, at its discretion, increase by four per cent the total assessed valuation of any such company."

The method of assessment of railroad property is prescribed in Laws of 1945, page 1825. That act required what is known as the "distributable" property of railroads to be assessed by the State Tax Commission, and the "local" property to be assessed by the assessor of the county in which the property is located. In the case of State ex rel. v. C., R. I. & P. Ry. Co. 162 Mo. 391, 1. c. 394, 63 S.W. 495, the plan of assessment was described as follows:

"The theory of the system of taxing railroads, as contained in our statute, seems to be that the railroad with all the necessary appurtenances to its efficient equipment as a means of traffic, is to be taken as a whole and assessed for taxation by the State Board of Equalization. That does not, however, include property that is used by a railroad corporation as a collateral facility to its business, such as workshops, etc., nor property held for purposes other than those of a carrier, all of which is subject to taxation by the local authorities."

Subparagraph (12) of Section 15 of an act found in Laws of 1947, Volume I, page 548, provides in part:

"The (State Tax) Commission shall have the exclusive power of original assessment of railroads,

Honorable Clarence Evans

railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies, and firms. * * *

(Underscoring ours.)

The Legislature, in providing for the assessment of pipe line companies in the same manner as railroad companies, did not expressly define what companies should be included within such classification. However, the provision of subparagraph (12) of the 1947 Act, above quoted, when considered in the light of the types of companies enumerated in Section 11295 clearly indicates, we feel, that the Legislature intended to confer upon the State Tax Commission authority to assess only the property of public utilities. The courts have held that the essential feature of a public utility is service to the general public. (State ex rel. v. Baker, 320 Mo. 1146, 9 S. W. (2d) 589.)

The pipe line here in question is not available for service to the general public, and, therefore, is not a public utility. Consequently, we feel that it is not such property as the Legislature intended to be assessed by the State Tax Commission.

Furthermore, the use of the term, "pipe line companies," indicates, we feel, an intention on the part of the Legislature to apply the section to companies, the principal business of which is transporting fuels by pipe line. We do not feel that they intended to include companies which own and use pipe lines as an incident to their principal business.

CONCLUSION

Therefore, this department is of the opinion that a pipe line owned by oil companies and used exclusively by said company for the transportation of its products is not assessable by the State Tax Commission under the provisions of Section 11295, Laws of 1945, page 1582.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

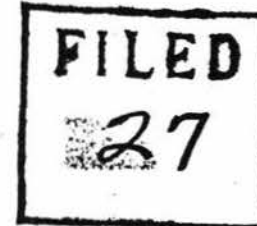
RRW/feh

RAILROADS:
TAX ASSESSMENT:

Real property operated as a parking lot by the Terminal Railroad Association of St. Louis is "locally assessable."

August 24, 1950

8/24/50



Mr. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion from this department which request reads as follows:

"We would be pleased to have your opinion as to whether or not the following real estate in St. Louis, owned and operated by Terminal Railroad Association of St. Louis, is assessable by this Commission as distributable property or is locally assessable. The Terminal Railroad submits the following facts which we assume are true as far as they go.

"Quoting from their letter of April 29, 1950 -

"This return includes the property immediately adjoining the Union Station on the West, now devoted to the use of parking for Union Station patrons. This lot is operated solely for the users of the Station and not as a public parking facility. It is connected with Union Station by means of an underpass, opening directly into the St. Louis Union Station and should be assessed as a part of the distributable property of the Terminal Railroad Association of St. Louis. This lot is situated in Block 1697 of the City of St. Louis, consisting of the entire South half of that block, bounded south by Walnut Street, east by 20th Street, west by 21st Street and North by an alley, together with a portion of the north half of said block, 100 feet wide, bounded on the north by Market Street, on the south by an alley and on the west by a line distant 111 feet 6 inches east of the east line of 21st Street, as shown indicated in red color on attached print."

Clarence Evans

"We have ascertained the following facts:

"The Terminal Railroad collects a fee of 10¢ for the first two hours for parking and 50¢ for any additional hours.

"It is also our opinion that anybody can park on this lot by paying the fee, whether he has business with the Union Station or not.

"It is our further understanding that this parking lot is across the street from the Union Station and is connected by an underpass or tunnel which is a great convenience for patrons of the Union Station."

By the Laws of Missouri 1945, page 1825, Sec. 3, it is made the duty of every railroad company to furnish the State Tax Commission an annual sworn statement, setting forth the length of their road in this state, the length of double or side-tracks, with depots water-tanks or turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property, owned, used or leased by them on the first day of January in each year, and the actual cash value thereof. It is the duty of the State Tax Commission to assess, adjust and equalize the aggregate value of the property of each one of the railroad companies. (Laws of Mo. 1945, p. 1825, Sec. 7). The Commission shall then apportion the aggregate value of all property specified above to each county, municipal township, city or incorporated town, special road districts,

public water supply, fire protection and sewer districts or subdivisions, except school districts, in which the road is located, according to the ratio which the number of miles of such road in the county, city, etc., bears to the whole length of the road in this state (Laws of Mo. 1945, p. 1952, Sec. 1). The type of property specified above has come to be known as, and is referred to in your letter, as "distributable property."

Laws of Missouri 1945, p. 1825, Sec. 3 provides:

"On or before the first day of May in each and every year, the president or any authorized officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotives engines, with freight or passenger cars thereon, shall furnish to the State Tax Commission a statement, duly subscribed and sworn to by said president, or other authorized officer, before some officer authorized to administer oaths, setting out in detail the total length of their leased road, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof. In case the report, from any railroad, required by this section, is not received by May 1st of the year in which it is due the State tax Commission may, at its discretion, increase by 4 per cent the total assessed valuation of the railroad company and certify such increase to the Director of Revenue for collection."

Other property, not specified in this section, is "locally assessable" as provided in Laws of Mo. 1945, p. 1825, Sec. 14:

"All real property, or tangible personal property, including lands, machine and workshops, roundhouses

and other buildings, goods, chattles and office furniture of whatever kind, and not hereinbefore specified, owned or controlled by any railroad company or corporation in this state, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

The law initiating the present scheme for the assessment of railroad property, in this state, was first enacted in 1871. In this first division of railroad property into two classes for the purposes of taxation, one class of property was referred to as "local" and the other as distributable and are discussed in *State ex rel. v. Hannibal & St. J. R. R. Co.* (135 Mo. 618). Since that time this taxing plan has been frequently amended but the basic scheme remains substantially unchanged.

In examining the cases relative to this problem we find the State Supreme Court discussing sections almost identical to those two quoted above in *State ex rel. Union Electric Light and Power Company v. Baker et al* (293 S.W. 399). The court quotes from R. S. Mo. 1919, Sec. 13002 and Sec. 13007 (substantially the same as the two sections quoted above) and says this of them:

"In *State ex rel. v. Hannibal & St. J. R. R. Co.* 135 Mo. 618, 37 S.W. 532, we referred to the property designated in the first of these two statutes (now Sec. 3) as "distributable" property and to that designated in the second (now Sec. 14) as "local" property. A distinction thus created between these two classes of property, for purpose of assessment and based upon the nature of the uses to which they are devoted, was indicated in *State ex rel. v. C. R. I. & Ry. Co.*, 162 Mo. 391, loc. cit. 394, 63 S.W. 495, 496, as follows:

"The theory of the system of taxing railroads, as contained in our statutes, seems to be that the railroad, with all the necessary appurtenances to its efficient equipment as a means of traffic, is to be taken as a whole and assessed for taxation by the state board of equalization. (Now the State Tax Commission). That does not, however, include the property that is used by a railroad corporation as a collateral facility to its business, such as workshops, etc., nor property held for purposes other than those of a carrier, all of which is subject to taxation by the local authorities."

Many cases which have arisen recognize and discuss the statutes which divide the property of railroads into two classes, the "local" and "distributable", the distributable consisting of the roadbeds, rolling stock and other movable property as enumerated in the Laws of Missouri 1945, p. 1825 Sec. 3. Other property, not specified in this section is referred to in Laws 1945, p. 1825, Sec. 14 and is locally assessable. (State v. Metropolitan St. R. R. Co., 61 S. W. 603, 161 Mo. 138).

The question presented here is into which of the two classes certain property owned by the Terminal Railroad Association of St. Louis should be classified i.e. whether it should be assessable by the State Tax Commission as distributable property or locally assessable. This real property is now devoted to the use of a parking lot for automobiles. It is operated primarily for the users of the station and not as a public parking facility. The Terminal Railroad collects a fee of ten cents for the first two hours of parking and fifty cents for any additional hours, but anyone can park on this lot by paying the parking fee, whether he has business with the Union

Station or not.

Following a review of the facts in this case and the precedent cases under the statutes dividing the property of railroads into two classes for the purposes of tax assessment we conclude this parking lot operation is clearly a collateral facility to the Terminal Railroad Association and is property held for purposes other than those of a carrier, and is locally assessable.

The whole purpose and intent of this legislation dividing the property of railroads into two classes for tax assessment makes it apparent that any such facility as that operated here which is collateral to the operation of a carrier is to be taxed locally, rather than as distributable property.


CONCLUSION

Real property now owned by and operated as a parking lot by the Terminal Railroad Association of St. Louis should be classified as locally assessable property and not as distributable property by the State Tax Commission.

Respectfully submitted,

JOHN E. HILLS
Assistant Attorney General

Approved



J. E. Taylor
Attorney General

JEM:mmm

TAXATION: Hatchery operator engaged in selling baby fowls should be classified as a merchant and subject to the merchant's
HATCHERY: tax. Farmer engaged in selling farm products not subject to merchant's tax provided he does not have a regular stand or place of business away from his farm. Person contracting to hatch eggs for others is not a merchant.

September 20, 1950

Honorable Clarence Evans
Chairman, State Tax Commission
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"A question has arisen in one of the counties of our state where a private owner living outside the city owns and operates a Hatchery within the city.

"This Commission would like to have your opinion as to whether a Hatchery should be assessed as a manufacturer or as a merchant."

"Manufacturer" is defined by Laws of Missouri, 1945, p. 1855, Sec. 4, in the following terms:

"Every person, company or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials, shall be held to be a manufacturer for the purpose of the foregoing section."

It is the opinion of this office that a hatchery operator does not come within this definition of "manufacturer."

Section 11303, Laws of Missouri, 1945, page 1838, defines the term "merchant" in the following terms:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be

Honorable Clarence Evans.

deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

It is the opinion of this department that the definition of merchant as it appears in the act levying a tax on merchants embraces the hatchery operator who shall deal in selling chickens or other fowls at a store, stand, or place occupied for that purpose.

May we also direct your attention to Section 11329, Laws of Missouri, 1945, p. 1838, Sec. 1, which exempts farmers from the act levying the merchant's tax in the following words:

"Any farmer residing in this state who shall grow or process any article of farm produce or farm products on his farm, is hereby authorized and permitted to vend, retail or wholesale said products, free from license, fee or taxation from any county or municipality, in any quantity he may choose, and by doing so shall not be considered a merchant; provided, he does not have a regular stand or place of business away from his farm. And provided further, that any such produce or products shall not be exempted from such health or police regulations as any community may require."

It appears from this section that if a hatchery were operated on a farm and the fowls grown or produced on the farm were sold by the farmer in any quantity he might choose such farmer would not be considered a merchant for the purpose of this merchant's tax, provided he did not have a regular stand or place of business away from his farm.

It appears from reading these sections that the legislature has expressed their intention that a farmer selling farm products should be exempt from the merchant tax but if one engaged in "selling goods, wares and merchandise at any store, stand or place occupied for that purpose" he is declared to be a merchant and subject to the tax levied on merchants.

In State v. West, 34 Mo. 424, it was held:

"To be a merchant in the sense of the law, the dealer must have on hands goods, wares and merchandise ready for sale and present delivery, and must also actually deal in the selling of the same."

Honorable Clarence Evans.

The operator of a hatchery who deals in the selling of baby fowls or birds from a stock of goods at a store, stand or place occupied for that purpose would be classified as a merchant for the purpose of this taxing act. Distinguish, however, the hatchery operator who may not engage in selling baby fowls from a stock kept at a store or place of business for that purpose but only contracts to hatch eggs that are brought to him for that purpose. Such a hatchery operator would not be engaged in any selling activity and would not be classified as a merchant. In *State v. West* (supra) the court said:

"One who manufactures and supplies goods alone to the previous order of his customers, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant within the meaning of the statute."

We can readily see the determination of whether a hatchery operator is to be classified as a merchant is a question of fact in each case. If such an operator is merely contracting to hatch eggs brought to him he would not be classified as a merchant who engages in selling baby chicks or birds from a store, stand, or place of business.

In the case of *Kansas City v. Ferd Hein Brewing Company* the court said: "It will be seen by these decisions that a manufacturer may or may not be a merchant within the meaning of the charter and statute of the state. If he keeps at a store, stand or other place, in stock articles manufactured by him for sale in the ordinary course of trade, he is a merchant. If he only manufactures upon order he is not a merchant (as the example of the hatchery operator who contracts to hatch eggs but does not stock baby chicks for sale.) It is therefore a mixed question of law and fact whether a manufacturer is or is not a merchant."

In *State v. Whittaker*, 33 Mo. 457, the court held: "A merchant, under the statute, is a person who deals in the selling of goods, wares, and merchandise, at any store, stand, or place occupied for that purpose. It is immaterial if the defendant, by his labor, changed the form of the goods sold; if he deals in the selling of the goods at a store he is a merchant for the purposes of the act." And it was further held that it was "immaterial that the store, stand, or place, may have been also occupied for some other purpose."

The legislature has provided this method of assessing merchandise for taxation differently from other personal property because of the variation of inventories of merchants and manufacturers. In this state merchandise is not listed for taxation as other per-

Honorable Clarence Evans.

sonal property, but instead the merchant is required to apply for a license to trade as such, and he is required to pay an ad valorem tax, equal to that which is levied on real estate, on the highest amount of goods and merchandise which he may have in his possession at any time during the period fixed by statute and it is the amount furnished by his sworn statement which forms the basis on which the various state, county, school, and municipal taxes are levied (State ex rel. Carleton Dry Goods Co. v. Alt. 123 S.W. 882; 224 Mo. 493.

It is a cardinal rule in construing a statute, repeated many times by the Supreme Court of this state, that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein. This principle was reiterated in Artophone Corporation v. Coale, 133 S.W. (2d) 343; 345 Mo. 354, in these words, "The primary rule of construction of statutes is to ascertain the lawmakers' intent from the words used, if possible, and to put on the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and manifest purpose of the statute."

Taking into consideration the purpose of the legislature in providing this method of assessing merchants and the section defining "merchants" quoted supra wherein the legislature has declared "every person * * * who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant," it appears the legislature has included the operator of a hatchery who keeps on hand a stock of baby chicks or other merchandise at a stand, store or place occupied for that purpose and offers such merchandise for sale as a merchant.


CONCLUSION.

It is the opinion of this department that one who operates a hatchery from which is sold baby chicks should be classified as a merchant and subject to the tax levied on merchants. Further, that a farmer engaged in selling farm products from his farm is specifically exempt from the merchant's tax provided he does not have a regular stand or place of business away from the farm in which he engaged in vending his products. Further, that if one solely contracts to hatch eggs for others but does not offer baby chicks for sale, such person would not be classified as a merchant.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney General

APPROVED:

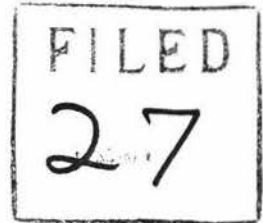

J. E. TAYLOR
Attorney-General

TAXATION:

STATE TAX COMMISSION:

A taxpayer may appeal from the assessment of a county assessor to the County Board of Equalization and from their decision to the State Tax Commission. A taxpayer has no right of appeal from the assessment of county assessor directly to the State Tax Commission.

November 21, 1950



Mr. Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for an official opinion on the following question:

"This Commission would like to have your opinion as to whether or not a taxpayer must have appeared before the County Board of Equalization protesting his assessment before he is qualified to be heard on Petition by the State Tax Commission of Missouri."

Provision is made by Laws of Missouri, 1945, p. 1782, Sec. 44, for a taxpayer to appeal to the county board of equalization from the assessment made by a county assessor in the following words:

"Every person who thinks himself aggrieved by the assessment of his property may appeal to the county board of equalization, in person, by attorney or agent, or in writing."

In prescribing the powers and duties of the State Tax Commission a taxpayer is accorded the right to appeal from the county board of equalization to the State Tax Commission. Laws of Missouri, 1945, p. 1805, Sec. 15, reenacted Laws, 1947, Vol. 1, p. 548, Sec. 15, (R.S.M.A. Sec. 11033.14 (5)) reads:

"Every owner of real property or tangible personal property and every merchant and manufacturer shall have the right to appeal from the local board of equalization under rules prescribed by the State Tax Commission. Said

Mr. Clarence Evans

Commission shall investigate all such appeals and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious." (Emphasis ours.)

You will note that while Laws of Missouri, 1945, p. 1782, Sec. 44, quoted above, provides for appeal from the assessment made by a county assessor and Laws of Missouri, 1947, Vol. 1, p. 548, provides for appeal from the local board of equalization to the State Tax Commission, there is no provision made for an aggrieved taxpayer to appeal to the State Tax Commission without first appealing from the assessment of the county assessor to the County Board of Equalization. The appeal to the State Tax Commission is not from the assessor's assessment but from the decision of the County Board of Equalization.

Laws of Missouri, 1947, Vol. 2, p. 436, Sec. 1, (R.S.Mo.A. Sec. 11033.15) further delineating the powers and duties of the State Tax Commission provides in part as follows:

"After the various assessment rolls required to be made by law shall have been passed upon by the several Boards of Equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the Commission, or by any member or duly authorized agent or representative thereof. In case it shall appear to the Commission after such investigation, or be made to appeal to said Commission by written complaint of any taxpayer, who has previously appealed to the local Board of Equalization, that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said Commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court, at the county seat, or at such other place in said county in which said roll was made as the Commission shall deem most convenient for the hearing herein provided.* * "

Mr. Clarence Evans

You will note that while this section also provides for complaints to be filed before the State Tax Commission it definitely states that the complaint of any taxpayer, who has previously appealed to the local Board of Equalization where individual assessments have not been made in compliance with the law shall be entitled to a hearing before the State Tax Commission or its agent.

It is the opinion of this office that a taxpayer must appeal from the assessment of a county assessor to the County Board of Equalization and has the right to appeal from the decision of the County Board of Equalization to the State Tax Commission; but a taxpayer is not accorded the right to appeal from the assessment of a county assessor directly to the State Tax Commission.

CONCLUSION

A taxpayer is accorded the right of appeal from the assessment of a county assessor to the County Board of Equalization and from the decision of the County Board of Equalization to the State Tax Commission. A taxpayer has no right of appeal from the assessment of a county assessor directly to the State Tax Commission.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS: Person appointed during Senate recess to fill
OFFICERS: vacancy on Kansas City Election Commission caused
by resignation entitled to pay.

February 9, 1950

Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri



Dear Sir:

This department is in receipt of your request for an
official opinion, which reads as follows:

"On June 30th, 1949, Governor Forrest Smith named four people to the Board of Election Commissioners of Kansas City, Missouri. Among those names was Elmo B. Hunter of Kansas City, Missouri. The names of all four members were submitted to the Senate by Governor Smith and were referred to the Senate Committee on elections. On July 1st, 1949, two of the names submitted were confirmed, namely, Ray Ecklund and Harold Marshall, and no action was taken by the Senate Committee with regard to the names of Mr. Hunter and the fourth appointee, Mr. Paul Walker. The Senate then recessed for the summer. On July 7th, 1949, Mr. Joseph Stewart, Democratic member of the Election Board who was holding over, resigned and his resignation was accepted on that date. On July 8th, 1949, while the Senate was in summer recess, Governor Smith appointed Elmo B. Hunter to the Election Board and issued him the usual commission. On that same date, he took the oath of office and otherwise qualified and entered upon the performance of his duties. He acted in all respects as a working member of the Election Board until November 8th, 1949, attending all meetings and otherwise performing the work of a member of the Board. On October 31st, 1949,

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the Senate reconvened from its summer recess and at the request of the Senate, Governor Smith resubmitted the names of Elmo B. Hunter and Paul Walker for confirmation. On November 8th, 1949, the Senate Subcommittee on Elections reported favorably to the Senate on Paul Walker and reported unfavorably on Elmo B. Hunter. Before any Senate action was taken with regard to that report, Governor Smith withdrew Mr. Hunter's name and as of that date Mr. Hunter ceased in the performance of any work under his interim appointment on the Board.

"Please advise whether or not the City of Kansas City may lawfully pay Mr. Hunter the statutory salary provided for a member of the Board of Election Commissioners of Kansas City, Missouri, for the time he performed his duties with that Board, namely, July 8th, 1949 to November 8th, 1949."

Section 12097 is a part of Article 23, Chapter 76 of the Revised Statutes of Missouri, 1939, which article relates to the holding of elections in cities of 300,000 to 700,000 inhabitants, and is applicable to Kansas City, Missouri. Said Section 12097 provides, in part, as follows:

"There is hereby created a board of election commissioners for each city that is governed by the provisions of this article, composed of four members. The first members of the Board of Election Commissioners shall be appointed as follows: Within sixty days after this article shall become effective, the Governor shall appoint, by and with the advices and consent of the Senate, for each of such cities four Election Commissioners, one of whom shall be by him designated as the Chairman of the Board, and another shall be by him designated as Secretary of the Board, which said Chairman and Secretary shall be of opposite politics. Said Election Commissioners, two of each party, shall be appointed for a term expiring January 15, 1941, and until their successors are commissioned and qualified. With the appointing

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and qualifying of the new election commissioners, as herein provided, the respective terms of office of any election commissioners appointed under any previous law applying to such city shall terminate. Successors shall be appointed in like manner for terms of four years, and until their successors are commissioned and qualified. Two of said election commissioners so appointed by the governor shall be members of the leading political party opposed to that to which the governor belongs. In case of a vacancy in said board from any cause whatever, it shall be filled by appointment for the unexpired term, in the same manner as in the case of original appointments, save that the appointee shall be a member of the same political party to which the person whom he may succeed belonged, and in no case shall more than two members of said board belong to the same political party. * * *"(Emphasis ours.)

It is the general rule, as stated in *Schulte v. City of Jefferson*, 273 S. W. 170, that:

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken."

In 42 Am. Jur. 962, Section III, it was said:

"Constitutional or statutory provisions may require appointments to public office or to certain designated offices to be approved or confirmed by some body other than the appointing power; and until this is done the appointee may not be legally entitled to the office, and the former incumbent of the office may hold over until such confirmation of his successor's appointment is had."

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The **same** rule is laid down in 46 C. J. , page 953. However, this rule applies when the confirming authority (in this case the Senate) is in session and there is an incumbent filling the office.

There are no cases in Missouri dealing with the question as presented in your request; that is, if there is "an absolute vacancy" as distinguished from a vacancy which is being held by the incumbent holding over after his term has elapsed. We do not in this opinion pass upon the situation as to whether the Governor may fill the vacancy without confirmation by the Senate when there is an incumbent holding the office (See 164 A. L. R., page 1249).

Mechem on Public Officers, page 67, par. 134, sets forth the rule as follows:

"It is **frequently** provided by the **constitu-**tions of the States, as by that of the United States, that the executive - the governor or president - shall have power to fill certain vacancies by appointments made 'by and with the advice and consent of the senate.' Where such a provision exists, the executive can only exercise the appointment without such advice and consent where, since the adjournment of the senate, a vacancy exists or has occurred (words held to mean the same thing) by the death or resignation of the incumbent or by the happening of some other event by reason of which the duties of the office are no longer discharged. If the senate be **in session** when the vacancy occurs, it can be filled only by and with the advice and consent of that body, unless the senate has adjourned before the vacancy is filled.

"If the vacancy is accidental and occurs or exists while the senate is not in **ses-**sion , and the concurrence of the senate has not been had, the appointment is temporary and contingent upon confirmation. In the event that it is not confirmed by the senate at its next session, either because the name was not sent in or was rejected, the appointment becomes inoperative from the moment of the adjournment of that session or from the moment of its rejection, as the case may be."

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Section 4, Article IV of the Constitution of Missouri, 1945, provides:

"The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

The purpose and meaning of Section 4, Article IV, supra, is given in the case of State ex inf. Hadley ex rel. Wayland v. Herring, 208 Mo. 708, 106 S. W. 984, 1c.726, as follows:

"The framers of our Constitution when they drew section 11, article 5 thereof, were considering vacancies in public offices; they foresaw that for various reasons such vacancies were inevitable, and in order to prevent and provide for these vacancies as far as possible in order that the public good should not suffer thereby, they framed this section, and gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law.* * The obvious purpose in conferring this authority upon the Governor was to prevent any interregnum in the office, and to have some person always authorized to discharge its duties. * * *"(Emphasis ours.)

In the present situation, Mr. Stewart, the predecessor of Mr. Hunter, had resigned and there was an absolute vacancy in the office, the duties of which no one was authorized to perform. When Mr. Hunter was appointed the Legislature was not in session, but was in recess. What was said in The People v. Fancher, 50 N. Y. 288, is especially applicable to the facts herein. In that case the Court of Appeals said:

"The evil to be guarded against by a temporary appointment was a vacancy in an important office, the duties of which cannot be performed by deputy or substitute. The remedy or preventive of the possible evil provided is an appointing power, capable of acting at all times and in any emergency, viz., the governor alone, if the senate is not in session; and the governor and senate, if that body is in session.

* * * * *

Honorable Henry H. Fox, Jr.

"* * *But when the sittings are terminated by an adjournment for months, and the actual meeting or sitting of the body thus interrupted, although the session is continued, it cannot be said that the body is 'in session.'
* * *"

In the case of State ex inf. Major ex rel. Sikes v. Williams, 222 Mo. 268, 121 S. W. 64, the Supreme Court had before it for construction a law relating to the appointment of a factory inspector by "The Governor of the State, with the advice and consent of the Senate." While the court in its opinion construed a particular statute, still the reasoning set forth therein, we believe, applies to the facts at hand (Mo. l. c. 283):

"* * *The law does not contemplate that there can be no occupant of the office until both the Governor and Senate have acted. Were that true, in case of the death of an occupant at a time when the Senate was not in session, the business of the office would have to cease until the Senate met. Such was never in the minds of the members of the General Assembly. * * *"

In 17 American & English Annotated Cases, page 1006, the Williams case, supra, is reported, and in the annotation to said case the rule is stated that:

"A vacancy, caused by death, resignation, removal, or other cause, so that there is no one to perform the duties of the office, may be filled by appointment during a recess of the confirming body."

In State ex rel. Nagle v. Stafford, 34 P. (2d) 372, the Supreme Court of Montana, citing cases from eight other jurisdictions, including the Williams case, said, l. c. 379:

"* * *appointments under consideration come within the general rule that 'where a person is appointed to an office under a constitutional or statutory provision that the appointment may be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office, except in the case of such a vacancy in the office that the duties of the office are no longer being discharged. ' * * *"

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In view of the above authorities, it will be seen that where an appointment to an office must be made by the Governor, by and with the advice and consent of the Senate, in the case of an absolute vacancy caused by death or resignation of the incumbent during the time that the Senate is not in session, the Governor may make an interim appointment until the Senate convenes and either confirms or rejects the appointment.

Applying the above rule to the facts at hand, it would appear that when Mr. Hunter was appointed to the Board of Election Commissioners of Kansas City, Missouri, to fill the vacancy caused by the resignation of Mr. Stewart, in view of the fact that the Senate was not in session such appointment was proper and Mr. Hunter was a de jure officer during the time that he served. As such de jure officer, Mr. Hunter was entitled to the pay and emoluments of such office.

CONCLUSION

It is, therefore, the opinion of this department that a person appointed by the Governor to the Board of Election Commissioners of Kansas City, Missouri, to fill a vacancy caused by the resignation of one of the members, which appointment was made at the time the Senate was not in session, is a valid appointment. If the appointment is withdrawn before the Senate reconvenes and acts upon said appointment, then the person is entitled to the pay from the date that he was appointed until the date that his appointment was withdrawn.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

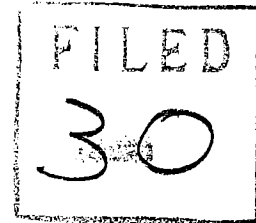
J. E. TAYLOR
Attorney General

GRAND JURY:
PROSECUTING ATTORNEY:

Jackson County Prosecuting Attorney may not receive funds from county in addition to those provided in contingent fund statute, Section 13470, R. S. Missouri, 1939. County court may not appropriate money to grand jury for investigation.

May 8, 1950

Honorable Henry H. Fox, Jr.
Prosecuting Attorney
Jackson County
Kansas City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"On May 8, 1950, the Honorable R. G. Cowan of the Jackson County Circuit Court will impanel a grand jury for the May term of court. The question has been raised as to what county funds may be made either directly available to that grand jury or through the office of the Prosecuting Attorney of Jackson County for the purpose of enabling the grand jury to conduct certain investigations now contemplated.

"Section 13470, R.S. 1939, apparently provides for a maximum contingent fund of \$2,500.00 per year, said sum to be available to the prosecuting attorney of class one counties for 'payment of the incidental expenses in bringing parties and witnesses from other states or counties and in properly preparing cases for trial, attending trial on changes of venue, attending at the taking of depositions, in printing briefs, * * * and generally such expenses as he may be put to in the proper and vigorous prosecution of the duties of his office.'

"It is requested that an official opinion of your office be furnished on the following question:

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"1. As to whether there is a contingent fund law now in effect, and if so, whether said law limits the maximum amount, available to the prosecuting attorney's office to the amount of \$2,500.00 per year; whether grand jury investigations might properly be interpreted into the meaning of Section 13470, and also whether or not the grand jury would be able to expend moneys out of this fund without accounting to the prosecuting attorney's office.

"2. As to whether or not Jackson County, Missouri, can lawfully appropriate any sum of money to the Prosecuting attorney's office in excess of \$2,500.00, and if not, whether Jackson County, under the present budget law, can make any sum available to a grand jury by merely making a flat appropriation and if so, from what fund."

Your first question is whether or not there is a contingent fund law now in effect. Section 13470, R. S. Missouri, 1939, provides:

"The treasurer of said county shall set aside the prosecuting attorney's fees, so turned into the treasury of said county, to be used as a contingent fund for the prosecuting attorney for the payment of the incidental expenses in bringing parties and witnesses from other states or counties and in properly preparing cases for trial, attending at the taking of depositions, in printing briefs, and appearing before the appellate courts of the state, and generally such expenses as he may be put to in the proper and vigorous prosecution of the duties of his office. Such fund shall be paid out as needed to the prosecuting attorney by the said county treasurer out of said fund in the treasury of said county, not exceeding two thousand five hundred dollars in any year, upon warrant of the prosecuting attorney, approved and signed by the judges of the

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criminal court of said county. At the end of each year said county treasurer shall pay into the general revenue fund of said county any balance that may be in his hands from fees, so collected, exceeding the sum of one thousand dollars."

This section was originally part of an act found in Laws of 1911, page 392. That act consisted of four sections which, in the Revised Statutes of Missouri, 1939, were Sections 13467, 13468, 13469 and 13470. The 1911 act by its title amended Article 3 of Chapter 104, R. S. Missouri, 1909, entitled, "Salaries of County Officers in Counties of 150,000 to 500,000 Inhabitants."

Several changes were made in what was in the 1939 revision Section 13467. (See Laws of 1919, page 671; Laws of 1929, page 374; Laws of 1933, page 373 and Laws of 1941, page 533.) None of the other sections of the original 1911 act were changed until 1945. At that time pursuant to Section 8 of Article VI, Constitution of Missouri, 1945, dealing with classification of counties, an act was passed (Laws of 1945, page 576) repealing Sections 12957, 12958, 12959, 12961, 12977 and 12987, relating to the salary and duties of assistants to the prosecuting attorney in the class of counties within which St. Louis County fell, and also Sections 13467 and 13468. Three new sections were enacted in lieu of the repealed sections known as 12957, 12958 and 12959, and applicable to first class counties. These sections deal with the number, compensation and duties of assistant prosecuting attorneys in first class counties.

The Sixty-third General Assembly also amended Section 13469, which provides for the payment of fees earned by the prosecuting attorney's office into the county treasury to make that section applicable in all first class counties. (Laws of 1945, page 1566.)

House Bill No. 922 of the Sixty-third General Assembly proposed the repeal of Section 12986, providing a contingent fund for the prosecuting attorney in counties with a population from 100,000 to 400,000, and also Section 13470. That bill was vetoed by the Governor because it provided that the fund should be set aside by the county clerk instead of by the county court. (House Journal, Sixty-third General Assembly, page 4525.)

At the Sixty-fifth General Assembly the committee on legislative research, in its report to the General Assembly on the proposed revision of the state statutes, made the following recommendation (Appendix to Report No. 11, Part I, page 119):

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"Section 12986 provides for a contingent fund for the prosecuting attorney in counties having a population of 100,000 to 400,000. Section 13470 also provides for such a fund in counties of the first class. This latter section adequately covers the former inasmuch as only one first class county (St. Louis) comes within the 100,000 to 400,000 population group.

"To the extent to which the sections conflict, that is as to the amount of fund, section 12986 providing for a sum of \$2500, and section 56.22 (13470) providing that all fees turned into the treasury by the prosecuting attorney shall constitute the fund, section 13470 should govern inasmuch as it refers to section 13469 which was basically changed in its application by re-enactment in 1945 (p. 1566), thus making sections 13469 and 13470 the most recent law. Therefore, the repeal of section 12986 is suggested."

Pursuant to the recommendation of the committee, House Bill No. 2014, which became effective on April 14, 1950, repealed Section 12986.

There has been no effective express repeal of Section 13470. It will be noted that Section 13470 provides:

"The treasurer of said county shall set aside the prosecuting attorney's fees, so turned into the treasury of said county, * * *"

(Underscoring ours.)

The underscored portion refers to the fees turned into the treasury under section 13469. That section applies to first class counties, and the reference to "said county" in 13470 must be to the counties included in Section 13469 to-wit: first class counties. Therefore, we feel that Section 13470, R. S. Missouri, 1939, is now in effect and applies to all first class counties which is the class to which Jackson County belongs.

This section definitely fixes a maximum charge the prosecuting attorney may spend for the purposes therein specified from the fund arising from the fees received by his office. The section quoted

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above expressly provides that a sum "not exceeding \$2,500.00 in any year" shall be paid from the fund for the purposes specified. This clearly fixes that figure as a maximum amount. Whether or not it also limits the amount which the prosecuting attorney may receive from other public funds will be discussed further below.

As to whether or not expenditures for grand jury investigations might be included in Section 13470, the answer appears to us to be in the affirmative. The fund there provided may be used by the prosecuting attorney for "generally such expenses as he may be put to in the vigorous prosecution of the duties of his office." Presentation of matters to the grand jury is one of the duties of the prosecuting attorney. (Sections 3912 and 3913, R. S. Missouri, 1939.) Any obligations incurred in the performance of such duty would certainly appear to be within Section 13470.

As for your inquiry regarding direct use of the fund by the grand jury, we think it clear that the fund is provided for the use of the prosecuting attorney only. There is nothing in Section 13470 which might in any way be construed to permit the direct use by the grand jury of the fund there provided.

Considering the first part of your second question, we find no statutory provision authorizing the Jackson County Court to provide you with funds for the purposes here in question. In the case of *Bradford v. Phelps County*, 357 Mo. 830, 210 S.W. (2d), 1. c. 999, the court stated:

"It has been written a county court is only the agent of the county which no powers except those granted and limited by law and, like other agents, it must pursue its authority and act within the scope of its powers. * * *"

In that case the court further stated, 210 S.W. (2d) 1. c. 1000:

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see Laws of Missouri, 1945, pp. 574, 578, and 583, Mo. R.S.A., Sections 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature

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has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. * * *

(Underscoring ours.)

We have in the present situation a statute authorizing a setting aside for the use of the prosecuting attorney of a sum not to exceed \$2,500.00 per year. Inasmuch as the Legislature has provided a fund for use by the prosecuting attorney, we feel that the prosecuting attorney must look to that fund alone for expenditures for the purposes therein provided, and that the county court, lacking any statutory authority, may not grant the prosecuting attorney additional funds for such purposes. (See *Alexander v. Stoddard County*, 210 S.W. (2d) 107.)

As for the county court's furnishing funds directly to the grand jury, the statutes are silent on this matter. There are, of course, statutes providing for the pay of witnesses before the grand jury, (Section 13421, R. S. Missouri, 1939.) and for the pay of grand jurors. (Section 714, R. S. Missouri, 1939.) Whether or not the grand jury may receive from the county funds to use in their operations has not been passed upon by the courts of this state. However, furnishing a grand jury funds for its own use in conducting an investigation has been held to be not a proper expenditure by courts in other states. In the case of *Allen v. Payne* (Cal.), 36 P. (2d) 614, the court stated:

"The facts are undisputed, and the only question is one of law, whether the grand jury has the power to employ persons to investigate

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crime, and make the compensation of the investigators a charge upon the county. Petitioner contends that the power exists by implication from the character of our grand jury, as provided for in the Constitution. It is argued that since the nature of the grand jury is not specifically defined in the Constitution, it is the body as known to the common law, with the same powers, including the power to institute its own investigations. See *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652. Section 922 of the Penal Code, also relied upon, provides: 'If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who must thereupon investigate the same.'

"From the time of the adoption of our Constitution to the present, the accepted practice has been to leave the detection of crime in the hands of sheriffs and district attorneys, and in our opinion, the departure from that practice finds no support in authority or legislative policy. The ferreting out of evidence of crime is a statutory duty expressly imposed upon certain officers, having the equipment and qualified personnel to perform it. This being so, there is no reason to resort to the very vague justification of 'inherent' or 'implied' powers. The existence of the power in other competent agencies tends to negative an implied power in the grand jury, which is obviously not equipped to exercise it. The grand jury's function of 'investigating' crime may be readily distinguished from detection."

The case of *William J. Burns International Detective Agency v. Doyle*, 46 Nev. 91, 208 P. 427, 26 A.L.R. 600, involved an action on a contract with members of a grand jury for employment of a private detective to assist in its investigation. The court held the contract contrary to public policy. A concurring opinion discussed the functions of a grand jury as follows: (208 P. 1. c. 430)

"The question is new in this jurisdiction, and, after most diligent research, I have been unable to find in the decisions of

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other courts any precedent for such a contract of employment by a grand jury, for the reason, I assume, that the method of procedure adopted by the grand jury in the exercise of its inquisitorial powers is most extraordinary and unusual.

"It is deemed proper to state that an impression widely prevails that grand juries, in the exercise of their inquisitorial powers, may assume the role of prosecutors in their commendable earnestness and zeal to bring to light for examination, trial and punishment violators of public authority, our Constitution, and laws. But such is not the law. Grand juries are not prosecutors. It is pointed out in a leading text on criminal procedure, that, when liberty is threatened by excess of authority, then a grand jury, irresponsible as it is, and springing from the body of the people, is an important safeguard of liberty. If, on the other hand, public order, and the settled institutions of the land, are in danger from momentary popular excitement, then a grand jury, irresponsible and secret, partaking without check of the popular impulse, may, through its inquisitorial powers, become an engine of oppression and of great mischief to liberty as well as to order. In the time of James II. the grand jury was called into existence to serve as a barrier against oppressive state prosecutions. Under our government the only valid basis upon which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecution and the accused, and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality. 2 Whart. Crim. Proc. 10th Ed. Kerr, Section 1295.

"'Grand juries,' it has been said, 'are high public functionaries, standing between accuser and accused. They are the great security to the citizens against vindictive prosecution, either by government or political partisans, or by private enemies. In their independent action the persecuted have found the most

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fearless protectors; and in the record of their doings are to be discovered the noblest stands against the oppression of power, the virulence of malice, and the intemperance of prejudice. These elevated functions do not comport with the position of receiving individual accusations from any source, not preferred before them by the responsible public authorities, and not resting in their own cognizance sufficient to authorize presentment. Nor should courts give unadvisedly aid or countenance to any such innovations.'

"These high ideals are condensed in a solemn obligation, to be administered to the foreman and taken by all the members of the grand jury before entering upon the discharge of their duties. It is true that in the discharge of their oaths they are required to make diligent inquiry into all offenses committed and triable and can obtain legal evidence. But I am of the opinion that, in the exercise of their inquisitorial powers, they are not required, neither are they empowered, to employ third parties to aid, assist and participate in the prosecution of their trust, outside of those public officers upon whom the law imposes the duty. * * *"

(Underscoring ours.)

In view of the foregoing, we feel that the county court would not be authorized to appropriate directly to the grand jury any funds for the use of the grand jury in conducting its own investigation.

CONCLUSION

This department is of the opinion that Section 13470, R. S. Missouri, 1939, which provides a contingent fund for use of the prosecuting attorney in certain counties, is now in effect and is applicable to all first class counties to which Jackson County belongs, and that said law limits the maximum amount available to the prosecuting attorney's office in first class counties to the

Honorable Henry H. Fox, Jr.

sum of \$2,500.00 per year; that expenditures by the prosecuting attorney in connection with grand jury investigations may properly be made from the fund provided by Section 13470, but that the grand jury is not authorized to expend money directly out of said fund.

We are further of the opinion that the Jackson County Court is not authorized to appropriate to the prosecuting attorney funds in addition to those provided by Section 13470 for use in connection with grand jury investigations, and that the Jackson County Court may not make an appropriation of a flat sum available to a grand jury.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

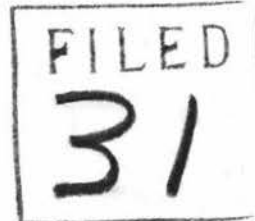
ELECTIONS:

Under provisions of Section 11682 judges selected by county court, clerks selected by judges.

March 7, 1950

FILED 31

Mr. Ronald J. Fuller
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"I would appreciate receiving an opinion from the Attorney General's Department on a question which is pertinent to the special election on the gasoline tax referendum which will be submitted to the voters of this State on April 4, 1950.

"Statement of Facts: Section 11682, Revised Statutes of Missouri, 1939, pertaining to Special Elections, provides that the Special Election shall be conducted in the manner provided by law for General Elections, but also provides, '...that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which casts the highest and next to the highest number of votes for governor at the last General Election'. In General Elections the County Court selects the judges from the names presented by the committee member of each political party from the township in which the polling place is situated, and the judges so selected in turn select their clerks to assist. In Section 11682, Revised Statutes of Missouri, 1939, there is no provision stating who selects the judges and the clerks, the section merely provides that 'one judge and one clerk to be selected from each of the two parties'.

"Question: Who selects the judges and clerks at each polling place under the provisions of Section 11682, Revised Statutes of Missouri, 1939?"

Mr. Ronald J. Fuller

Section 11682, R. S. Mo 1939 provides as follows:

"Whenever a proposed amendment to the Constitution or the proposition: 'Shall there be a convention to revise and amend the Constitution?' shall be submitted to the voters at a special election, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions are submitted at a general election: Provided, that it shall not be necessary to hold said election with booths for the voters and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and next to the highest number of votes for governor at the last general election; except that in cities and counties where registration of voters is now provided for by law that said special elections shall be held in accordance with the provisions of law now in effect applicable to the holding of elections in said cities and counties: Provided further, that the secretary of state shall provide for the same publication in newspapers and the same posting of notices at voting places of the proposition, 'Shall there be a convention to revise and amend the Constitution?' as is provided by law in the case of proposed constitutional amendments."

(Underscoring ours)

Section 11502, R. S. Mo. 1939 and Section 11504, Laws of Missouri, 1947, Vol. 2, p. 232, constitute the general law of this state for the selection of judges and clerks at elections. Section 11502, R. S. Mo. 1939, provides as follows:

"All judges of elections, appointed under the provisions of this article shall be selected by the county court from a list of persons furnished said court in the form and manner following: The political party that polled the largest number of votes at the last preceding general election and the political party that polled the next largest vote at said

Mr. Ronald J. Fuller

election shall, each, through its central committee, furnish to said county court at least fifteen days before the election, a list of names of persons qualified by law to serve as judges of election, double the number required for judges of said election, from which said list said county court shall, at least ten days before the election herein provided for, select and appoint the number of judges required to hold said election, taking one-half of the judges so appointed from each of said lists: Provided, that for the purpose of determining the political parties entitled to representation on the election board, the county court shall take the vote cast for governor throughout the entire state for the respective parties: Provided further, that if any political party, through its committee, shall fail to present a list of names as aforesaid, within the time aforesaid, then the said county court may select and appoint the requisite number of judges provided by law for said party."

Section 11504, Laws of Missouri, 1947, Vol. 2, p. 232 provides as follows:

"In all precincts casting less than two hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting two hundred or more votes in the last preceding general election, the judges shall appoint four clerks. The clerks, before entering on the duties of their appointment, shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, that they will faithfully record the names of all the voters; said clerks shall also take the oath above prescribed for judges to be administered at the same time and in the same manner heretofore directed."

It is our view then that the judges, one from the Democrat and one from the Republican party, are to be selected by the county court and the clerks, one from the Democrat and one from the Republican party, are to be selected by the judges.

Section 11515, R. S. Mo. 1939, providing as follows:

"In all counties in this state in which a special election shall be held for the purpose of voting

Mr. Ronald J. Fuller

upon any proposition to issue bonds for any purpose, which, under the law, must be submitted to the vote of the qualified electors for determination, two judges and two clerks of such election shall be appointed by the county court for each special election precinct: Provided, that the provisions of this law shall not apply when any such proposition is submitted to be voted upon at a regular primary election or a general election."

is not applicable in this case as such section refers only to special elections for the purpose of voting upon any proposition to issue bonds for any purpose and is not a statute providing for general elections referred to in Section 11682.

CONCLUSION

It is the opinion of this department that in any county where the special referendum election of April 4, 1950 is to be conducted under the provisions of Section 11682, R. S. Mo. 1939, that at each polling place there is to be one Republican and one Democratic judge to be selected by the county court and that at each polling place there is to be one Republican and one Democratic clerk to be selected by the aforesaid judges.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

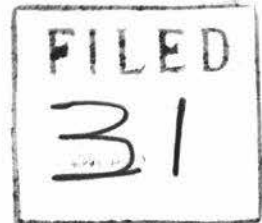
Governor to appoint eligible person to fill vacancy in office of coroner in fourth class county. Such officer to hold office for the remainder of the term.

CORONER: The next election for county coroner will be at the general election in 1952.

April 6, 1950

Filed: #31

Honorable Edwin Frieze
Prosecuting Attorney
Dade County,
Greenfield, Missouri



Dear Sir:

This is in reply to your request for an opinion from this department, which request reads as follows:

"Here in this County at last general election Dr. Cain was elected coroner of this county. Some time near first of this year Cain resigned and moved away. Shortly thereafter the Governor appointed his successor. Kindly let me know if a coroner is to be elected at our fall election?"

The power to fill vacancies occurring in public office is conferred upon the governor by Article IV, Section 4 of the State Constitution, which reads as follows:

"Sec. 4. The governor shall fill all vancancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

Your attention is also directed to L. 1945, p. 1404, Sections 2 and 4, which read as follows:

"Sec. 2. At the general election in the year 1948, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a coroner who shall be commissioned by the Governor, and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each coroner shall enter upon the duties of his office on the first day of January next after his election: Provided, that the term of office of persons holding the office of coroner at the time this act shall take effect shall not be vacated or affected thereby."

"Sec. 4. When any vacancy shall occur in the office of coroner by death, resignation, removal, refusal to act, or in any other manner, it shall be the duty of the Governor to fill such vacancy by appointing some eligible person to such office. The person so appointed shall take the oath, give bond and otherwise qualify for the office as required of coroners regularly elected, and shall discharge the duties of such office for the remainder of the term for which he is appointed."

The term of office of a county coroner is fixed by L. 1945, p. 1404, Sec. 2, quoted above, as four years and provides for election of a coroner in the general election in 1948, and every four years thereafter. L. 1945, p. 1404, Sec. 4 provides for the appointment by the Governor of some eligible person if a vacancy should occur in this office by resignation as has occurred in your county, and provides further such officer so appointed "shall discharge the duties of such office for the remainder of the term for which he is appointed." The coroner appointed by the Governor to fill the unexpired term may hold office until the general election in 1952. The statute seems unambiguous and clear that the appointment to fill the unexpired term shall be for the remainder of the term which will not end until December 31, 1952.

CONCLUSION.

Upon the resignation of a duly elected county coroner, the Governor shall appoint some eligible person to fill the vacancy. The coroner so appointed shall hold office for the remainder of the term for which he is appointed. Since the county coroner was elected in the general election in 1948 and the term of office does not expire until December 31, 1952, the person appointed to fill the vacancy may hold office until December 31, 1952.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General

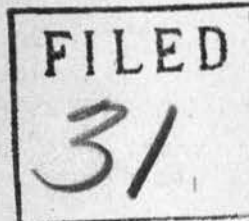
APPROVED:

J. E. TAYLOR
Attorney-General

COUNTY TREASURER) Salary in counties of the fourth class under
) township organization determined according to
) statute fixing salary of treasurers in fourth
) class counties generally.

April 19, 1950

4/26/50



Honorable Edwin Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"As Dade County is a fourth class county and under township organization there is a question as to what is the salary of the County Treasurer. The population of the County is eleven thousand plus (11248). After reviewing Sec 13993 of the Revised Statutes of 1939 and then Laws of Missouri 1945 at page 1541 what should the salary of the County Treasurer be. In the Laws of Missouri of 1945 on page 1540 a law is provided for compensation of Treasurers in third-class counties and that law excludes counties under township organization but the law governing fourth class counties on page 1541 does not exclude counties under township organization. If you find that Sec. 13993 of the Revised Statutes is still in effect does the County Court have the authority to raise the Treasurer's salary above the \$100 as set out in that section."

The salaries of county treasurers in fourth class counties generally are fixed by an act found in Laws of Missouri, 1945, page 1541. That act provides:

"The county treasurers in counties of the fourth class of this State shall receive for their services annually, to be paid out of the county treasury in equal monthly installments at the end of each month by a warrant drawn

Honorable Edwin Frieze

by the county court upon the county treasury, the following sums: In counties having 10,000 inhabitants or less, the sum of \$1,200; in counties having more than 10,000 inhabitants and not more than 12,500, the sum of \$1,500; in counties having more than 12,500 inhabitants and not more than 15,000, the sum of \$1,800; and in counties having more than 15,000 inhabitants, the sum of \$2,200; provided, salaries set out and prescribed in this section shall be in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind for county treasurers in all counties of this state to which this section, by its terms, applies, the provisions of any other statute of this state to the contrary notwithstanding."

Section 13993, R. S. Missouri, 1939, provided:

"The county treasurer in counties adopting township organization shall be allowed a salary of not less than \$100.00 per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of two per cent (2%) on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent (2%) on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: provided, he shall receive nothing for paying over money to his successor in office."

This section was repealed by House Bill No. 80 of the Sixty-fifth General Assembly, approved April 26, 1949, and effective October 14, 1949, and a new section enacted in lieu thereof. The only change made was to increase the commission allowed the collector on corporation taxes, back taxes, licenses, merchants' tax and railroad tax from two per cent to three per cent.

House Bill No. 2012 of the Sixty-fifth General Assembly, effective April 14, 1950, repealed House Bill No. 80, and enacted a new section in lieu of Section 13993 of House Bill No. 80. That section now reads as follows:

Honorable Edwin Frieze

"The county treasurer in counties of the third class adopting township organization shall be allowed a salary of not less than \$100.00 per month by the county court to be paid as at present provided by law; the county collector for collecting and paying over the same shall be allowed a commission of three per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: provided, he shall receive nothing for paying over money to his successor in office."

This enactment was pursuant to Report No. 11 of the Committee on Legislative Research as follows: (Appendix to Report No. 11, Part I, page 109)

"Section 13993 provides for the compensation of the treasurer in township organization counties where he is ex officio collector, on the basis of a minimum salary and commissions on tax collections. Section 1, Laws 1945, p. 1540 (54.26) in fixing the salary of the treasurer in third class counties, expressly excepted treasurers in township organization counties but section 1, Laws 1945, p. 1541 applying to salaries of treasurers in fourth class counties contains no such exception. On the contrary, it expressly provides that the salary there fixed shall be the total compensation of the treasurer. It follows then that the compensation of treasurers as ex officio collectors as fixed by section 13993 can only apply to the treasurer of third class counties. It is accordingly suggested that section 13993 be reenacted and made applicable only to third class counties."

Thus, by this enactment the Legislature has clarified the intent of the 1945 Act, above referred to, fixing the salaries of county treasurers in fourth class counties. Any doubt which might have existed has been resolved by the enactment expressly limiting the statute fixing the compensation of county treasurers in counties under township organization to counties of the third class.

Honorable Edwin Frieze

CONCLUSION

Therefore, it is the opinion of this department that the salary of the county treasurer in counties of the fourth class under township organization for services as county treasurer is fixed by the Laws of Missouri, 1945, page 1541.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General



RRW/feh

TOWNS AND VILLAGES: Delinquent taxes of any town or village shall be
TAXATION: collected by the county collector in the same manner
as delinquent state and county taxes are
collected.

May 16, 1950



Honorable W.C. Frank
Prosecuting Attorney
Adair County
Kirksville, Missouri

*See op. 99 dated Dec 27, 1955
to Woolsey*

Dear Sir:

I.

This will acknowledge receipt of your recent letter in which you requested an official opinion of this department, which letter reads as follows:

"The County Collector of Adair County has asked me to ascertain from your office whether or not you have an official opinion construing his duties under Section 7260 R.S. Missouri 1939, regarding what procedure he would have to take in order to collect taxes of towns or villages referred to in this Section after they have been certified to him and asked that if you had not already given an opinion construing this Section that I request that you prepare an official opinion setting forth what his duties are under this section and he specifically would like to know if he can sell real-estate for non-payment of taxes the same as he does for non-payment of county and state taxes or whether or not he would have to first bring a suit and obtain judgment and then proceed to sell the real-estate."

II.

Section 7260, R.S. Mo. 1939, which has been re-enacted by House Revision Bill No. 2030, and numbered Section 80.48 for the Revised Statutes of 1949, provides the method for the assessment and collection of revenues by town and villages and is as follows:

"All assessments on real and personal property within the limits of such town, which may be certified and transmitted to the board of trustees, from time to time as provided in the preceding section, shall be taken and considered as the lawful and proper assessment on which to levy and collect the municipal taxes of the town, and the payment of all taxes authorized by this article shall be enforced by the collector in the same manner and under the same rules and regulations as may be provided by law for collecting and enforcing the payment of state and county taxes, and for that purpose it shall be the duty of the board of trustees to require the collector, annually to make out and return, under oath, a list of delinquent taxes remaining due and uncollected on the first day of January of each year, to be known as the delinquent list. It shall be the duty of the board of trustees, at the next meeting after such delinquent list shall be returned, or as soon thereafter as convenient, carefully to examine the same, and if it shall appear that all property and taxes contained in said list are properly returned as delinquent, they shall approve such list and cause an order of approval to be entered on the journal, and the amount of taxes in such list to be credited on the account of the collector; and shall also cause said delinquent list or a certified copy thereof, with the bills therefor, to be placed in the hands of the county collector, who shall give a receipt therefor and proceed to collect the taxes due thereon, in like manner and with the same effect as delinquent taxes for state and county purposes are collected. The said collector shall pay over the taxes collected to the city treasurer, at the times and in the manner provided by law for the payment of county taxes to the county treasurer, and shall make the same statements and settlements for such taxes with the board of trustees, and at the same time as may be provided by law for statements and settlements with the county court for county taxes, and all taxes shall bear the same rate of interest, and the same penalties shall attach to the nonpayment thereof when due, as may be provided by law in cases of county taxes. A certified copy of any tax bill included in the delinquent list, approved by the board

Hon. W. C. Frank

of trustees, shall in all cases be prima facie evidence that the amount therein specified is legally due by the party against whom such tax bill is made out, and that all provisions of the law and ordinances have been duly complied with, and that the same is a lien on the property therein described."

This section has not been construed by our appellate courts since the enactment of the Jones-Munger Tax Law which was enacted in 1933. This section very definitely states that the towns and villages shall place the collection of the delinquent taxes in the hands of the county collector, and he is clearly directed to collect such taxes as he collects delinquent taxes due the state and county.

Section 11202, R. S. Mo. 1939, which has been re-enacted by Senate Revision Bill No. 1024, and given Section number 140.34, R. S. Mo. 1949, is as follows:

"The collectors of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state shall, on or before the first Monday in March, annually return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city or incorporated town remain due and unpaid. The county collector shall receipt for the aggregate amount of such delinquent taxes, which receipt shall be held by the treasurer of the city or town, and shall stand as evidence of indebtedness upon the part of the county collector and his bondsmen to such city or town, until settlement in full has been made by payment to said treasurer or his successor of all taxes thus receipted for, or by a return of such part as is uncollectible."

This section is a general section that applies to all cities and towns that do not have authority to enforce the collection of their delinquent taxes. This section provides that the delinquent taxes shall be turned over to the county collector before the first Monday in March. Section 7260, supra, provides the board of trustees of a town or village shall turn over said delinquent taxes to the county collector at the next meeting after the first day of January of each year, or as soon thereafter as convenient.

Hon. W. C. Frank

Section 11202, supra, places a definite deadline for the action on the part of the board of trustees in turning over the delinquent list of taxes to the county collector.

Section 11203, R.S. Mo. 1939, which has been re-enacted by Senate Bill No. 1024 and given section number 140.343, R.S. Mo. 1949, is as follows:

"The power to collect such city or incorporated town tax or special assessments before sale is hereby given to the county collector after said delinquent list is received by him."

This very definitely gives the county collector the power to collect such delinquent taxes. Section 11204, R.S. Mo. 1939, which has been re-enacted by Senate Revision Bill No. 1024, and given Section No. 140.353, R.S. Mo. 1949, provides that such delinquent town and village taxes shall be embodied in the list of delinquent state and county taxes and Section 11205, R.S. Mo. 1939, re-enacted Laws 1945, page 1822, and re-enacted by Senate Revision Bill No. 1024 and given Section No. 140.357, R.S. Mo. 1949, provides the amount of compensation the county collector shall receive for collection of delinquent back taxes due towns and villages.

Your letter asks if the county collector may sell real estate for non-payment of delinquent taxes the same as he does for non-payment of delinquent county and state taxes. The answer to this question is in the affirmative. The provisions for the collection of delinquent and back taxes is set forth in Article IX of Chapter 74, R.S. Mo. 1939, and has been re-enacted and revised by Senate Revision Bill No. 1024 and will appear in Chapter 140, R.S. Mo. 1949. The County collector will follow the procedure set forth in this chapter for the collection of delinquent back taxes to enforce collection of the delinquent taxes of any town or village in his county. Suits for the collection of delinquent personal taxes would be filed by the county collector with the assistance of the prosecuting attorney.

The Supreme Court of Missouri in the case of State v. Nolte, 138, S.W.2d. 1016, considered the question whether or not the county collector or the city collector should collect the delinquent taxes of a city of the fourth class under the provisions of the Jones-Munger Tax Law. The court held that the city collector of a city of the fourth class has been given the power to collect delinquent taxes and that he was the proper officer to collect such taxes due a city of the fourth class.

The Supreme Court of Missouri in the case of Gilmore v. Hibbs, 152 S.W. 2d. 26, considered the same question as it applied to a

Hon. W. C. Frank

city of the third class, and held that the city collector was the proper officer to collect the delinquent taxes due a city of the third class.

The Supreme Court of Missouri in the Nolte case stated that Section 9970, R. S. Mo. 1929, now Section 11202, R. S. Mo. 1939, applied only to the limited number of cities which still return their delinquent taxes to the county collector instead of city officials. The Legislature has not seen fit to give towns and villages the power to collect their delinquent taxes by any of their officials.

This department on August 8, 1933, rendered an official opinion to the State Tax Commission in regard to the question of who shall collect delinquent taxes due towns and villages. We held that delinquent taxes due towns and villages are to be collected by the county collector under the provisions of Senate Bill 94. Senate Bill 94 is now known as the Jones-Munger Tax Law which was cited above, and is part of said Article IX of Chapter 74, R. S. Mo. 1939.

We again rendered an opinion on this question on March 28, 1934 to Mr. C. C. Kenneth of Granger, Missouri, wherein we set forth the duties of the parties under the provisions of Section 7260, R. S. Mo. 1939, and a copy of this opinion is herewith attached.

CONCLUSION

It is the opinion of this department that under the provisions of Section 7260, R. S. Mo. 1939, the delinquent taxes of any town or village shall be returned to the county collector of the county in which they are located on or before the first Monday in March of each year. The collector shall enforce the collection of such delinquent taxes in the same manner as delinquent taxes due the state and county are collected. Any real estate that has such delinquent taxes levied against it may be sold by the county collector in accordance with the provisions of Chapter 74, R. S. Mo. 1939. He may file suit for the collection of delinquent personal taxes.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

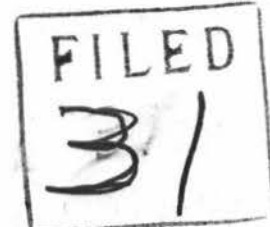
SJM:mw
Enc.

OFFICERS) County Treasurer's compensation may not be increased
during term of office.

June 13, 1950

FILED 31

Honorable Edwin Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Recently it was found that the Dade County Court had been underpaying the County Treasurer, Mr. Tom Scott, since the beginning of his term April 1, 1949. After determining that Mr. Scott was due the amount he claimed the Court promptly made the payment.

"Now the former County Treasurer, Mr. L. L. Anderson, has filed a bill with the County Court for back pay from April 1, 1946 to April 1, 1949 at \$25.00 per month, 36 months \$900.00.

"I note that H. B. 781, Section 1, page 1541, Laws of Missouri 1945 which determines the salary of the County Treasurer in 4th Class counties was approved March 7, 1945. Did it become effective on that date? Mr. Anderson's term of office was from April 1, 1945 to March 31, 1949. Is there a regulation providing that an increase in salary of a county officer shall not become effective during their present term of office?

"Is it mandatory that the County Court pay Mr. Anderson the amount he claims as back pay?"

Dade County is a county of the fourth class, having township organization. According to the 1940 census, its population was

Honorable Edwin Frieze

11,248. Section 13993, R. S. Missouri, 1939, which was in effect on April 1, 1945, provided:

"The county treasurer in counties adopting township organization shall be allowed a salary of not less than \$100.00 per month by the county court to be paid as at present provided by law; the county collector for collecting and paying over the same shall be allowed a commission of two per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: Provided, he shall receive nothing for paying over money to his successor in office."

This was the section which fixed the compensation of Mr. Anderson at the time he assumed the office of county treasurer. Apparently, although it does not directly appear from your letter, the county court had determined that the allowance should be One Hundred Dollars (\$100.) per month.

An act found in Laws of 1945, page 1541, fixed the compensation of county treasurers in fourth class counties as follows:

"The county treasurers in counties of the fourth class of this State shall receive for their services annually, to be paid out of the county treasury in equal monthly installments at the end of each month by a warrant drawn by the county court upon the county treasury, the following sums: In counties having 10,000 inhabitants or less, the sum of \$1,200; in counties having more than 10,000 inhabitants and not more than 12,500, the sum of \$1,500; in counties having more than 12,500 inhabitants and not more than 15,000, the sum of \$1,800; and in counties having more than 15,000 inhabitants, the sum of \$2,200; provided, salaries set out and prescribed in this section shall be in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind

Honorable Edwin Frieze

for county treasurers in all counties of this state to which this section, by its terms, applies, the provisions of any other statute of this state to the contrary notwithstanding."

This act became effective on July 1, 1946. (Joint Resolution No. 1, Sixty-third General Assembly, Laws of 1945, page 2019.)

In an opinion to you dated April 19, 1950, we concluded that the compensation of county treasurers in fourth class counties under township organization was fixed by the 1945 act, above quoted. However, this act became effective after Mr. Anderson's term of office as county treasurer had begun.

Section 13 of Article VII, Constitution of Missouri, 1945, provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; * * *"

(Underscoring ours.)

Under this constitutional provision, the 1945 act could not have had the effect of increasing the salary of Mr. Anderson to One Hundred Twenty-five Dollars (\$125.) per month, or Fifteen Hundred Dollars (\$1,500.) per year, which is the salary fixed by the 1945 act for a county of the fourth class having a population between 10,000 and 12,500 inhabitants. Therefore, Mr. Anderson's compensation would have remained the same as it was at the beginning of his term.

CONCLUSION

Therefore, it is the opinion of this department that the compensation of a county treasurer of a county of the fourth class under township organization, whose term commenced on April 1, 1945, was determined under Section 13993, R. S. Missouri, 1939, and that if the compensation fixed by the county court under that section was less than that provided in an act found in Laws of Missouri, 1945, page 1541, and fixing the compensation of county treasurers in fourth class counties, the 1945 act was not effective during

Honorable Edwin Frieze

the term of such treasurer in view of the provisions of Section 13, Article VII, Constitution of Missouri, 1945, prohibiting the increase of compensation of county officers during their term of office. We are of the opinion in the circumstances that Mr. L. L. Anderson is not entitled to be paid his claim for increased compensation during the period from April 1, 1946, through April 1, 1949.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

COUNTY:

Third and fourth class counties may issue negotiable "tax anticipation notes" to borrow money on anticipated tax collections.

March 31, 1950.

3/31/50

Hon. A. L. Gates,
Prosecuting Attorney
Moniteau County,
California, Missouri.

FILED

32

Dear Mr. Gates:

This is in reply to your recent request for an opinion from this department reading as follows:

"I would like to know the legal effect of a county handling protested warrants in the following manner:

"The county does not have sufficient revenue in class 3 for roads to carry on the proper maintenance of county highways. So instead of issuing a large group of warrants which must be protested individually, the county issues one large warrant which is protested, and on this protested warrant a bank makes a loan, the money obtained from this loan is then used to take up the ordinary and usual warrants in said class 3.

"May a county borrow on anticipated revenue in this manner? What legal protection does the bank have when it purchases or loans money on the one large protested warrant? What is the county's liability.

"As prosecuting attorney, I would like very much to have an official opinion on these questions involved in this problem."

Your primary question is whether a county may borrow on anticipated revenue, and since Moniteau is classified as a third class county we assume you desire an answer applicable to counties of that class.

Your attention is directed to L. 1945, p. 1411 (R.S. Mo. annotated, Sec. 13927a to 13927h) which provides the method a county court may follow in borrowing money and issuing negotiable notes. Those sections read as follows:

"L. 1945, p. 1411, Sec. 13927a: County court authorized to issue negotiable notes to be paid in one year out of revenue.-- The county court in counties of class 3 and class 4 may by resolution, duly passed by a majority of the judges thereof, and upon order of said court, issue negotiable notes payable in one year or less from the date of issue out of the current county revenues, respectively, to be derived from taxes or other revenues of the county of the year in which said notes are issued; but where taxes are levied for special purposes or revenues derived from special sources other than taxes resulting from a levy, the notes issued against the anticipated revenues derived therefrom shall bear a statement that the said notes are to be paid out of said special taxes or special revenues.

"L. 1945, p. 1411, Sec. 13927b. Notes to be known as tax anticipation notes - made by county treasurer, signed by presiding judge, and attested by county clerk.-- Said notes shall be known as tax anticipation notes, and by no other name, and on the back of each of said notes there shall appear a certificate that it is issued pursuant to an order of the county court, the total borrowing power herein authorized and the aggregate principal amount of all prior notes and warrants theretofore issued and registered at that date. Such certificate shall be made by the treasurer of the county wherein such notes are issued and his signature thereto shall constitute conclusive evidence to the holder of such note that the same was duly authorized under and within the powers, limitations and provisions of this act. Said notes shall be signed by the presiding judge of the county court, attested by the county clerk with the seal of his office affixed thereto.

"L. 1945, p. 1411, Sec. 13927c. Estimation of county revenue to be basis for issuing anticipated notes.-- The notes herein authorized shall not be issued until after the anticipated revenue for the year has been estimated, as herein provided in Section 13927e, and when issued shall be in proportion to the total estimated revenue as follows: Not to exceed ten per cent (10%) in any one month in any year and the total of such notes issued shall not exceed ninety per cent of the total anticipated revenue in any county in any one year, but if said notes, or any thereof, shall not be issued within or at the times so fixed, they may be

subsequently issued to the amount so limited, but in no event shall said notes be issued if there be on hand general revenues sufficient to pay the general operating expenses of the county.

"L. 1945, p. 1411, Sec. 13927d. Issued for no longer than twelve-month period.-- Said notes shall be issued to mature in one or more months, but not to exceed twelve months, after date of issue, shall be payable to bearer, shall bear a rate of interest not to exceed six per cent per annum from date until maturity, and shall be in such form as the county court may prescribe. If sufficient funds shall not be on hand to pay any of said notes at maturity the same shall continue to bear interest at the rate therein provided until necessary funds are available for the payment thereof.

"L. 1945, p. 1411, Sec. 13927e. Board of estimate of anticipated revenue.-- The judges of the county court, the clerk of the county court, the assessor, the collector and the treasurer of the county shall constitute a board of estimate of anticipated revenue. In each year, after the tax levy shall have been made by the county court, said board shall make an estimate of the revenues of the county for the current year: Provided, however, that such estimate may be made at any time during the year prior to the making of such tax levy upon the basis of a tentative levy made by the county court, but if the estimate shall in due course be thereafter changed or such levy shall be changed when made at the time provided by law, then such prior estimate shall be changed and corrected accordingly to conform to the facts, and the amount of the notes to be subsequently issued, shall be limited or may be enlarged to conform to such subsequent or corrected estimate, so that in no event will the aggregate of all notes issued exceed ninety per cent of the percentage of the taxes which will be collected for the current year, the board in making said estimate will use the average percentage of collections of general county taxes of the prior three years.

"L. 1945, p. 1411, Sec. 13927f. County treasurer to sell notes - publication - private sale.-- The county treasurer is authorized to sell such notes upon the order and under the direction of the county court, and shall cause notice to be published for ten days in at least two weekly papers of general circulation published in the county; that sealed proposals for the purchase of all or any part of said notes will be received at his

office, and that the same will be opened by him in the presence of the county court on the day and year mentioned in the notice. Said treasurer shall, under the direction of the court, reject any or all bids that the court may not deem satisfactory as to price or otherwise, and in case of rejection, he may again advertise and sell said notes in the same manner. Or, if the court so order, the county treasurer may sell the said notes or any part thereof at not less than their face value, at private sale without advertisement, and report the same to the court at the next term thereafter.

"L. 1945, p. 1411, Sec. 13927g. Registration of notes.-- The faith and credit of the county shall be deemed to be pledged for the payment of said notes with interest in the manner and from the funds herein specified as though a statement to that effect were indorsed thereon. All notes issued under this article shall be registered immediately before delivery in the office of the county treasurer and the clerk of the county court, in books kept for that purpose which registry shall show the number, date, amount, date of sale, name of the purchaser and the amount for which the notes were severally sold, and such notes shall have preference and priority in payment, from the date of registration, over all notes and warrants subsequently issued and registered in such counties and over all prior issued unregistered warrants.

"L. 1945, p. 1411, Sec. 13927h. Proceeds from sale of notes to be deposited in county treasury - used only to pay warrants - use of surplus.-- The moneys derived from the sale of the tax anticipation notes herein authorized, shall be deposited with the county treasurer and the clerk of the county court shall charge the treasurer of the county therewith. And said moneys shall be used solely for the payment of county warrants of such counties issued for the payment of the expenses and obligations of the county of the fiscal year in which said notes are issued; but should there remain a surplus after all said warrants have been paid the said surplus may be applied on the order of the county court to the payment of maturing anticipation notes if any or transferred to the various county funds respectively according to law."

Prior to the effective date of this act in 1946, counties of this class were not authorized to borrow money against anticipated tax collections. There was no general statute conferring authority on county courts to borrow money for the county in anticipation of tax collections except in counties with a population in excess of 50,000 inhabitants. There is now no statute establishing the procedure suggested in your letter, i.e., for a county to issue a warrant which when protested to be used as basis for a loan. A county may borrow money on anticipated revenue but only in the manner prescribed by the statute cited supra.

Section 13927g provides the extent of legal protection afforded to the holder of the note so issued in these words, "The faith and credit of the county shall be deemed to be pledged for the payment of said notes with interest* * *."

Since this act provides a specific method which a county of the third class may follow in borrowing money on anticipated revenue, this method is exclusive and the county cannot borrow money by issuing warrants.

CONCLUSION.

A third or fourth class county may borrow money on anticipated tax receipts by issuing negotiable tax anticipation notes, and cannot borrow money by the issuance of warrants.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney-General

JEM/LD

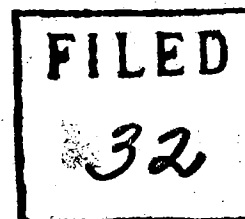
DIVISION OF HEALTH:
PRIVILEGED COMMUNICATIONS:

A regulation of the Division of Health
requiring privileged communications
to be held confidential.

May 26, 1950

5/26/50

Mr. L. M. Garner, M.D., M.P.H.
Director, Maternal and Child Health
Division of Health
Jefferson City, Missouri



Dear Sir:

I.

This will acknowledge receipt of your letter in which you request an official opinion from this department as to the legality of the following regulations adopted by the Division of Health:

"The following is a regulation adopted by the State Division of Health on May 20, 1950, in regard to keeping information confidential.

"All information as to personal facts and circumstances obtained by the State or local staff administering the health program shall constitute privileged communications, shall be held confidential and shall not be divulged without the individual's consent. This means all personal items such as social, medical or financial facts and circumstances pertaining to any individual served or recorded by the State or local staff, except such information that must be revealed to comply with the law, or required as evidence in any proper court.

"General information such as total expenditures made, number of people served and other statistical information is not considered as confidential provided such general information cannot be identified with any particular individual.

"The use of all information and records shall be limited to purposes directly connected with the administration of the Division of Health program and no disclosure of such information shall be made other than in the administration of this program.

"The person in charge of any office or unit of the Division of Health shall provide for the adequate protection of any confidential records and procedures and shall be responsible for the enforcement of this regulation.

"As new staff members are hired the person in charge of the office to which they are assigned must inform them of this regulation."

II.

Section 1895, R. S. Mo. 1939, provides as follows:

"The following persons shall be incompetent to testify: First, a person of unsound mind at the time of his production for examination; second, a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; third, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client; fourth, a minister of the gospel or priest of any denomination, concerning a confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination; fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon."

The Supreme Court of Missouri held in the case of Gartside v. Connecticut Mutual Life Insurance Company, 76 Mo. 446, as follows:

"The construction contended for by defendant's counsel, that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient would, in our opinion, nullify the law. To hold that, while under the statute a physician would be forbidden from disclosing a statement made to him by his patient that he was suffering from syphilis; and to allow him to state as the result of his observation and examination of the patient that he was diseased with syphilis would

Dr. Buford G. Hamilton

be to make the statute inconsistent with itself. It is doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz: his own diagnosis of the case, would he to restrict the operation of the statute to narrower limits than was ever intended by the legislature and virtually to overthrow it.


"It follows from what has been said that the circuit court erred in permitting Drs. Gregory and Bauduy, two physicians, to give in evidence the information acquired by them while attending Gartside, their patient, professionally, although such information was acquired not from what the patient said but from observation and examination.
* * *"

Your regulation is in accordance with the above section and is within the rule-making power of the Division of Health.

CONCLUSION


It is the opinion of this department that the above and foregoing regulation adopted by the Division of Health, May 20, 1950, is hereby approved as to legal form and content.

APPROVED:


J. E. TAYLOR
Attorney General

SJM:mw

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

WORKMEN'S COMPENSATION: The election by a county may be made by the County Court. Such acceptance does not cover elective officers.

OFFICERS:

February 7, 1950

2/9/50
Mimeo copies available
7-23-54

Honorable Spencer H. Givens
Director
Division of Workmen's Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri



Dear Director Givens:

We have given further consideration to your written request to this department for an opinion respecting the application of Section 3693, R. S. Mo. 1939, to the public employments and employers named in said section. In reply to your request there was submitted to you the opinion of this department dated September 30, 1949. In the former opinion it was said that that part of Section 3693, in the fifth paragraph thereof, authorizing the public bodies named therein, to elect to bring themselves under the terms of the Compensation Act, is in violation of Section 38(a) of Article III and Sections 23 and 25 of Article VI of the present Constitution of this State, in that it is in excess of legislative power to pass an Act authorizing public bodies to grant public monies to private persons, and is, therefore, unconstitutional.

Upon further consideration it is believed that the former opinion was erroneous and the same is overruled and withdrawn.

You submit three questions in your letter for consideration. They are:

- "(1) By whose authority a county may accept the Law;
- (2) if such acceptance is filed, does it cover elective officers, and
- (3) if such acceptance does cover elective officers can they reject the Law as employees."

This department now believes that said Section 3693 is valid and effective; that any of the public

Honorable Spencer H. Givens

employers referred to in the fifth paragraph thereof may elect to bring itself within the provisions of the Act and that the use of public funds for such purposes as workmen's compensation would not be contrary to said sections and provisions of our Constitution, because the operation of such public bodies and acts of such public bodies in the employment of their employees and the performance by their employees of their duties directed by such employers, are in themselves the carrying on and performing the functions of public government for the benefit of the public, and that the use of public funds for the payment of workmen's compensation to such employees would not constitute the grant or gift of public money to private individuals, and, therefore, would not violate such named sections or any other provisions of our Constitution. The payments of workmen's compensation or of premiums on insurance for such purpose are not grants or gifts but a part of, or incident to, the wages of the employee.

The Supreme Court of Missouri has not had occasion to pass upon the question of whether the use of public funds to pay workmen's compensation by such public bodies would be permissible under the Constitution, but the Court has had before it numerous cases where the question arose whether the payment of money to private individuals who were performing services in the public interest could be made out of public funds, appropriated for such services for cities, or to be paid to hospitals, industrial homes, county farm bureaus which are formed by private citizens, for the establishment of a municipal airport, and other like matters, and in which cases the Court held that such services and such enterprises were for public purposes and justified the payment therefor out of public funds and that such payments did not violate the provisions of the Constitution prohibiting the use of public funds as a gift or grant to private individuals. (State ex rel. Crow, Attorney General vs. City of St. Louis, et al., 174 Mo. 125; State ex rel. vs. Seibert, 123 Mo. 424; State ex rel. vs. Industrial Home for Girls, 144 Mo. 275; Jasper County Farm Bureau vs. Jasper County, 315 Mo. 569, and Dysart vs. St. Louis, 321 Mo. 514, et cet.)

The case of State ex rel. Crow, Attorney General vs. City of St. Louis, 174 Mo. 125, was considered by the

Honorable Spencer H. Givens

Supreme Court on the constitutional question of the right of the city to appropriate public money to reimburse a city officer for money expended arising out of the discharge of his official duties. Holding that the appropriation of such funds and the payment thereof to the officer for such purposes were constitutional, the Court, l.c. 149, said:

"Here the municipal corporation had a duty to perform, rights to defend, and interests to protect in removing or having removed, the nuisance from the streets. The officer acted bona fide, within the scope of his duties, lawfully. The indemnity was legal and proper."

In many of the States having Workmen's Compensation Acts the Courts have held that public bodies such as are named in said Section 3693, which have accepted such Acts may use public funds for the payment of compensation and that such payment does not violate any constitutional provision prohibiting the use of public money as a private grant or gift to individuals.

The following cases have considered statutes defining the status of different classes of employments such as are named in said Section 3693 as to being public employments authorizing them to pay compensation to their employees out of public funds, and have held that such statutes did not violate any constitutional provision prohibiting the granting of public funds to private individuals. (Michigan---Wood vs. Detroit, 188 Mich. 547, 155 N.W. 592, L.R.A. 1916 C 388 (1915); Montana---Re Lewis & Clark County, 52 Mont. 6, 155 P. 268, L.R.A. 1916 D 628 (1916); Ohio---Porter vs. Hopkins, 91 Ch. St. 74, 109 N.E. 629 (1914); Illinois---McLaughlin vs. Industrial Board, 281 Ill. 100, 117 N.E. 819 (1917); Arizona---Fairfield vs. Huntington, 23 Ariz. 528, 22 A.L.R. 1438 (1922); Maryland---Clauss vs. Board of Education, 30 A. (2d) 779 (1943); Nevada---Nevada Industrial Commission vs. Washoe County, 41 Nev. 437, 171 P. 511 (1918); Colorado---School District No. 1 vs. Industrial Commission, 66 Colo. 580, 185 P. 348 (1919); Georgia---City of Macon vs. Benson, 175 Ga. 502, 166 S.E. 26 (1932); City of Atlanta vs. Pickins, 176 Ga. 833, 169 S.E. 99 (1933); State Highway Department vs. Bass, 29 S.E. (2d) 161 (1944); and Louisiana---Kroncke vs. Caddo Parish School Board, 183 So. 86 (1938).)

Honorable Spencer H. Givens

The Colorado case of School District #1 vs. Industrial Commission, 66 Colo. 580, 185 P. 348, after referring to a constitutional provision similar to those in Missouri, said: (l.c. 350):

"It has repeatedly been held that the object is a public one even where the sole purpose of the act was to provide compensation for private employees only. It can be none the less for a public purpose when the statute, as in the case at bar, is so framed as to provide for compensation to public employees also. * * * * *."

"The manner in which a state, a municipality or a school district, shall treat its employers appears to be peculiarly a matter for legislative determination. * * * ."

This decision is logical and sound and in harmony with the spirit and purpose of Workmen's Compensation Acts in the design of such Acts to serve a public benefit as well as to establish social justice for employees, and constitutes, with the other cited cases, persuasive authority for our belief that if this question were before our Supreme Court for decision, it would hold the same view.

Considering the above cited Missouri cases as directive and the decisions cited from other States as persuasive, we believe that neither the terms of said Section 3693, nor the operation thereunder of the public bodies named therein who may elect to accept the terms of the Workmen's Compensation Act, by providing and paying public funds to their employees as workmen's compensation, due for injuries sustained under the Act, are violating the provisions of our Constitution in so doing.

It follows, we believe, that such employers as are named in said Section 3693 as public bodies, and being governmental agencies performing duties for the benefit of the public, may elect to bring themselves under the terms of the Act, and may use public money for the payment of workmen's compensation, when due their employees under the Act.

Honorable Spencer H. Givens

The first specific question you submit is: "By whose authority a county may accept the Law." The statute is silent as to who shall make the election to accept the act for the employers named in Section 3693. In the case of a county, the election should be made by the county court which has the general management and control of the business of the county (Section 7, Article VI, Constitution of Missouri, 1945; Section 2480, R. S. Mo. 1939).

Your second specific question is: "If such acceptance is filed, does it cover elective officers?" The determination of this question depends upon the construction of Section 3695(a), R. S. Mo. 1939, as amended, Laws of Missouri, 1947, Vol. II, page 438, which defines the word "employee." The relevant part of this section is:

"The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, * * *"
(Emphasis ours.)

The phrase "under any appointment or election" would include elective officers if they were employees as defined in this section. However, the words "in the service" have been construed by the courts of this state in numerous cases to require the relation of master and servant to exist before one is considered an "employee" within the meaning of the Workmen's Compensation Act. In construing this definition of "employee," the courts have given consideration to the definition of "employer" in Section 3694, R. S. Mo. 1939, which defines "employer" as one "using the service of another for pay." It seems obvious that there cannot be an "employee" unless there is an "employer." In a recent case, *McQuerrey v. Smith St. John Mfg. Co.*, 216 S.W. (2d) 534, 1.c. 537, the court said:

" * * * The phrase, 'using the service of another for pay', means the right to control the means and manner of that service, as distinguished from the results of such service. * * *"

In another recent case, *Stout v. Sterling Aluminum Products Co.*, 213 S.W. (2d) 244, 1.c. 246, after referring to the requirement of the statute itself and the holdings of the court that the law should be liberally construed as

Honorable Spencer H. Givens

to the persons to be benefited, the court said:

" * * * The relationship of master and servant must exist in any case to make it compensable, and when that relationship ceases to exist, whether temporarily or permanently, the liability of the employer for accidental injury to the employee ceases to exist."

Other cases construing the Workmen's Compensation Act holding that the relationship of master and servant must exist before one is an "employee" within the meaning of the act are: Knupp v. Potashnick Truck Service, 135 S.W. (2d) 1084; Bernat v. Star-Chronicle Publishing Co., 84 S.W. (2d) 429; Langley v. Imperial Coal Co., 138 S.W. (2d) 696, 234 Mo. App. 1087; Schultz v. Moerschel Products Co., 142 S.W. (2d) 106.

No discussion of the relation between elective officers of a county and the county itself is necessary to show that the relation of master and servant does not exist. It is perfectly obvious that neither the county nor the county court has that control over the work and duty of elective officers which is necessary to establish the relationship of master and servant. The duties of the elective officers are fixed by statute, and each officer is essentially independent and responsible to only the people who elected him.

Elective officers of a county are not employees of the county and are not covered by the Workmen's Compensation Act if such act is accepted by the county. The answer to this question renders unnecessary any answer to your third question, which is: "If such acceptance does cover elective officers, can they reject the Law as employees?"

CONCLUSION

Considering the above authorities, it is therefore the opinion of this department that:

1. The public employers named in said Section 3693, R. S. Mo. 1939, may severally elect to bring themselves within the terms of the Workmen's Compensation Act.

Honorable Spencer H. Givens

2. The use of public money by such public employers in the payment of workmen's compensation to their employees for injuries by accident arising out of and in the course of their employment is not in conflict with any section or provision of the Constitution of this state.

3. An election to accept the provisions of the Workmen's Compensation Act by a county may be made by the county court.

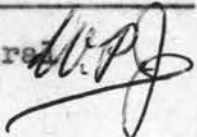
4. Such acceptance does not cover elective officers.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



GWC:ir

INHERITANCE TAX:

Inheritance tax should be determined and assessed in accordance with terms of will, rather than on basis of disposition provided by assignment of part of legatee's interest to others.

February 10, 1950



Mr. C. L. Gillilan, Supervisor
Inheritance Tax Division
Department of Revenue
Jefferson City, Missouri

Dear Mr. Gillilan:

We have your recent letter requesting an opinion from this office. Your letter is as follows:

"In this estate, Deceased was survived by a sister, Marge Garey of New York, a brother, Fred F. Kashner of Indianapolis, Indiana, and a brother, Alonzo R. Kashner of Indianapolis, Indiana. In her will, Deceased devised and bequeathed \$1.00 to her sister, Marge Garey, \$1.00 to her brother, Fred F. Kashner, and the entire remainder of her estate amounting to approximately \$30,000.00 to her brother, Alonzo R. Kashner.

"Deceased died on April 18, 1949, at Kansas City, Missouri, and letters of administration were issued on the estate to Zula Chase, as executrix, on April 22, 1949. Although the entire estate except \$2.00 passed under Deceased's will to the brother, Alonzo R. Kashner, under an instrument dated May 2, 1949, copy of which is attached, Alonzo R. Kashner 'conveyed, assigned, transferred and delivered and set over' one-third of the total value of the estate to his sister, Margaret K. Garey, and recited that the other one-third interest should be held by Alonzo R. Kashner as Trustee for the benefit of his brother, Fred F. Kashner.

"You will note that the instrument by which Alonzo Richard Kashner, the principal beneficiary, divides the estate equally among his sister, his brother,

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

and himself, is a unilateral instrument executed solely by Alonzo Richard Kashner, and it is not an instrument in which the three parties have sought to settle a bona fide dispute as to the disposition which should be made of the estate. In the instrument dated May 2, 1949, Alonzo R. Kashner recites only that among the purposes of the instrument he intends to avoid 'any controversy or dispute or unhappy differences with his brother and sister aforesaid.'

"If the Missouri inheritance tax is assessed in accordance with the distribution made by the will, only one \$500 deduction would be allowed to the principal beneficiary and the balance of the estate would be subjected to a tax of 3% on the first \$20,000 of net estate and 6% on the remainder. If, however, the tax on the respective interests is assessed on the basis of the distribution made under the terms of the instrument dated May 2, 1949, the net estate would be divided equally, a \$500 deduction would be allowed each beneficiary, and the remaining interest in each one-third would be taxed at only 3%. Although the difference is not great, confusion arises when the Supreme Court opinion in the case of *In Re Gartside's Estate*, 207 S. W. 2(d) 273 (357 Mo. 181) is considered. In the Gartside's case, a bona fide difference among possible beneficiaries resulted in a will contest. The Court in that case noted that there had been a will contest and directed that the respective interests should be taxed in accordance with the distribution which resulted from the agreement settling the will contest. The Court noted in that case, however, at S. W. 1.c. 275.

"Logically, it would seem to follow that if a beneficiary may renounce the whole legacy, he may renounce a part and the part so renounced is not subject to the tax as property transferred to him by the will.'

"In this situation should the tax be assessed in accordance with the terms of the will or in accordance with the distribution made in the attached instrument?"

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

A thorough consideration of the facts you set out above leads us to believe the fundamental question here is whether or not there has been a compromise agreement and renunciation to which the language in the Gartside case would apply.

Your letter refers to an accompanying instrument by which certain property which Alonzo Kashner inherited under the will of his sister is transferred and set over to his living brother and sister. Pertinent portions of that instrument are as follows:

"NOW, THEREFORE, in pursuance of my desires and intention aforesaid, and for the purpose of effectuating the same, I, Alonzo Richard Kashner, of Indianapolis, Indiana, sole residuary legatee and distributee in the Last Will and Testament of Ruby Kashner Loring, deceased, formerly of Kansas City, Missouri, subject to and upon all of the terms and conditions herein expressed, do hereby convey, assign, transfer and deliver and set over unto

"(1) my sister Mrs. Margaret K. Garey, of Mount Kisco, New York, an equal one-third of all my right, title and interest, both legal and equitable, in and to all of the estate of Ruby Kashner Loring, deceased, whether real (and as to such only to the extent and in the manner hereinafter provided), personal or mixed, of which the said Ruby Kashner Loring died seized or possessed or to which she may in any manner be or become entitled, that I may now or hereafter claim, demand, own or be or become vested with, or entitled to, under or by virtue of any of the terms and provisions contained in the Last Will and Testament of Ruby Kashner Loring, deceased, * * *

"(2) myself, Alonzo Richard Kashner, as Trustee, an equal one-third of all my right, title and interest both legal and equitable, in and to all of the estate

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

of Ruby Kashner Loring, deceased, whether real (and as to such only to the extent and in the manner hereinafter provided), personal or mixed, of which the said Ruby Kashner Loring died seized or possessed or to which she may in any manner be or become entitled, that I may now or hereafter claim, demand, own, or be or become vested with, or entitled to, under or by virtue of any of the terms and provisions contained in the Last Will and Testament of Ruby Kashner Loring, deceased, which has been duly admitted to probate in the Probate Court of the County and State aforesaid and an equal one-third interest in the proceeds of all life insurance policies on the life of Ruby Kashner Loring in which I am named as beneficiary; to hold the same, however, IN TRUST, for the following uses and purposes:

"* * * for the use and benefit of my brother Fred R. Kashner during the term of his life or until the exhaustion of the corpus of such trust or the termination thereof as hereinafter provided.

"The other one-third share not otherwise conveyed, transferred or assigned pursuant to the provisions hereof is reserved to my own sole and express use and benefit.

"Notwithstanding the tenor or effect of the foregoing provisions, this document is executed upon the condition precedent that no legal or beneficial interest is conveyed or intended to be conveyed in and to any of the real property devised to me in and under the provisions of the will aforesaid of my sister, it being my intention with respect to the real property (and this document shall always be so construed) to transfer and assign only a share in the proceeds arising upon the sale of any such real property when, and as, the same is sold by me upon terms and conditions satisfactory to and approved by me. I agree to take such steps immediately as may be necessary and proper to effectuate and consummate a sale of such real property so that the proceeds arising therefrom

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

may be promptly distributed as I have provided herein.
* * *

Relevant quotations from the Gartside case, 207 S. W. (2d)
273, 357 Mo. 181 are as follows:

"We are not impressed with the reasoning that under a compromise agreement to settle a will contest the contestee receives the property as an assignee of the legatee. The right to contest a will is given only to those who have a right under the law to participate in the estate. Therefore, an heir who brings a will contest is claiming the property in his own right under the statute of decent and distribution. When such an heir takes property under a compromise agreement, the legatee renounces so much of the legacy and the contestee takes the property as heir, and not as an assignee. * * *

* * * * *

"* * * 'So far as the will became effective under the agreement it was because of the heirs' contest and release and in consideration of the distribution they received by reason of their being heirs.'"

(Underscoring ours.)

* * * * *

"* * * 'When a will contest has been amicably settled between the beneficiaries named in the will and the heirs at law and they have in good faith stipulated for a decree of distribution in accordance with the settlement and there is no intent thereby to evade or reduce the inheritance tax, the tax should be computed upon the portion received by each beneficiary under the decree.'"

It appears from the quoted portion of the Gartside case (above), that the basis of assessing the tax according to the agreement rather than by the terms of the will, is that when a compromise results from a bona fide will contest, that the legatee

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

is renouncing part of his share under the will, and the contestees are taking, "not as assignees, but as heirs."

In the instant situation it is manifest that the brother and sister are not taking as heirs, as a result of a contest and compromise, but only as assignees.

The instrument states most clearly that Alonzo "conveys, assigns, transfers and delivers" his legacy. This is no "stipulation for a decree of distribution" such as is required to bring it under the rule of the Gartside case, but is actually and realistically an acceptance of the terms of the will by Alonzo and a subsequent gift, by him, of parts of his legacy.

To sum up to this point, then, the court in the Gartside case states that where a bona fide will contest develops, and a compromise agreement is entered into, the legatee thereby renounces a portion of his legacy, and the contestants take the property as heirs, and not as assignees, of the legatee.

It follows then, that if there is no contest, and no compromise agreement, there is no renunciation, and if the other heirs take at all, they must take, not as heirs, but as assignees.

It is too clear for discussion that the facts before us do not indicate any compromise agreement, as a result of a bona fide will contest. The instrument is an unilateral gift or grant of part of his legacy. It should be noted, although it is not decisive here, that the instrument gives away only a very small part of Alonzo's legacy. First, he reserves all realty to himself, to dispose of when and as he sees fit, and second, although he places one-third of his legacy in trust for his brother, he reserves the right to revoke said trust and pay over the corpus to himself, individually, free of trust.

It is equally clear that whatever interest in the \$30,000 Alonzo's brother and sister are taking, they cannot be taking by will, for it provides otherwise, nor as heirs, for there has been no will contest nor a resulting compromise agreement. As you suggest in your letter, the instrument of assignment creates no binding compromise agreement based on a valuable consideration, but is merely a unilateral instrument executed "to avoid any controversy * * *."

Mr. C. L. Gillilan
Supervisor
Inheritance Tax

In *Priedeman v. Jamison*, 202 S.W. (2d) 900, 1.c. 903, the Supreme Court of Missouri said (in referring to inheritance tax):

"Such a tax is an excise on the privilege of taking property by will or by inheritance or by succession in other form upon death of the owner."

Inasmuch as Alonzo's brother and sister are not taking by will, nor as heirs, there is no conceivable basis for assessing an inheritance tax based on their interests.

It is, however, apparent that Alonzo is taking \$30,000 by will, and thus the inheritance tax must be based on his interest.

The tax, therefore, should be assessed on the basis of one legacy of \$30,000, rather than three of \$10,000 each, or one of \$20,000 and one of \$10,000, or any other combination.

CONCLUSION

It is therefore, the opinion of this office that the inheritance tax should be determined and assessed on the basis of a disposition as made by will, rather than on the basis of a disposition as provided for by an assignment of part of legatee's interest to other.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HJD:hr

INHERITANCE TAX: Damages received under wrongful death statutes
not subject to Inheritance Tax.

March 17, 1950.

3/18/50

Mr. C. L. Gillilan, Ass't. Supervisor,
In Charge of Inheritance Tax,
Department of Revenue,
Capitol Building,
Jefferson City, Missouri.

FILED

33

Dear Mr. Gillilan:

We have your recent request for an opinion. Your letter
of request is as follows:

"I am enclosing a letter from Mr. John W.
Adams, Public Accountant, Marshall, Missouri,
which is self-explanatory.

"This question is frequently presented and
this Department would appreciate an opinion
from your Office for future guidance.

"We have in our file an opinion written by Mr.
John W. Hoffman, Assistant Attorney General,
bearing date of January 26, 1937, addressed to
Mr. R. J. Green, Farmers Bank of Trenton,
Trenton, Missouri, in which he held that damage
recovered under the Federal Employers Liability
Act was not subject to the State Inheritance
Tax.

"This Department has, however, in the past
asserted claim for tax in cases similar to the
one herewith presented. In fact, in many in-
stances administration is had for the sole pur-
pose of obtaining damage, either by judgment
or settlement agreement, and the amount recovered
represents the entire estate, out of which is paid
allowed claims.

"In all cases brought to our attention the tax
has been paid on the amount recovered and paid into
the estate, or the administrator, for distribution
under Probate Court Order."

March 17, 1950.

Mr. Gillilan:

The letter from Mr. Adams, referred to in your letter is as follows:

"Under appointment from the Probate Court of Saline County I am serving as appraiser for state inheritance tax in the estate of a decedent who was killed in an automobile collision with a Greyhound Bus.

"Suit was brought against the bus company for damages for the death of the decedent by his heirs in the name of the administrator of decedent's estate (I am informed that said administrator is the only person permitted to bring such action under Missouri law). Settlement was effected with the bus company without trial under the terms of which they paid the administrator as trustee the agreed upon amount.

"There is now a difference of opinion among local attorneys (including the Judge of the Probate Court) as to whether the amount received from the bus company should be included in the assets of the decedent's estate subject to the Missouri Inheritance Tax."

Section 571 R.S. Mo. 1939 is in part as follows:

"Property subject to inheritance tax. - A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations, or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

" * * * When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or

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Mr. Gillilan:

donor, or intending to take effect in possession or enjoyment at or after such death.

"* * * When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, in trust or otherwise and the transferor has retained for his life or any period not ending before his death, (1) the possession or enjoyment of or the income from the property, or (2) the right to designate the persons who shall possess or enjoy the property or income therefrom, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

(Underscoring ours)

It is clear from the above that there are four, and only four, forms of transfer of property subject to inheritance taxation in Missouri:

- (1) By will;
- (2) By the intestate laws of this state;
- (3) In contemplation of death or intended to take effect in possession or enjoyment after death;
- (4) In trust where the transferor has retained the income for life or the right to name the persons who shall possess the property or income therefrom.

Section 3653 R.S. Mo. 1939 is as follows:

"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable

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Mr. C. L. Gillilan:

to an action for damages, notwithstanding the death of the person injured."

Section 3654 R.S. Mo. 1939 (as amended, Laws 1945, page 846, Section 1) is as follows:

"Damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in Section 3652; and in every such action the jury may give such damages, not exceeding fifteen thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

Section 3652 R.S. Mo. 1939 provides for suit for, and recovery of, damages in part as follows:

"* * * First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased: * * * third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or, fourth, if there be no husband, wife, minor child or minor children, natural born or adopted as hereinbefore indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator

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or executor of the deceased and the amount recovered shall be distributed according to the laws of descent, and such corporation, individual or individuals or such officer, servant, agent, employee, master, pilot, engineer, or driver, may show as a defense that such death was caused by the negligence of the deceased. * * * "

The damages were received in this case under and by virtue of the section set out above, by the administrator for the benefit of the beneficiaries named in this same act. Whatever these beneficiaries received, was not by reason of any of the four forms of taxable transfers heretofore set out, but solely under the terms of this state law.

In the case of Troll v. Laclede Gas Light Company, 182 Mo. App. 600 the court said as follows, after setting out the Death Act statutes, supra, l.c. 605, 607:

"In Holton v. Daley, Admx., 106 Ills. 131, where the action was under a statute in terms the same as our section 5426 (3653 supra), it is said: 'In construing this section this court said, in City of Chicago v. Major, 18 Ills. 356: "The Legislature intended that the money received should not be treated as a part of the estate of the deceased . . . The personal representatives bring the action, not in right of the estate, but as trustees for those who have a more or less direct pecuniary interest in the continuance of the life of the deceased and who had some claim at least upon his or her natural love and affection." * * * "

(Words in parenthesis ours)

"In such case the executor or administrator, in prosecuting the action is a mere nominal party,

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who sues for the benefit of the real party in interest; and such damages as he may recover do not go to the estate of the deceased, nor belong to him in his representative capacity, but to the person for whose benefit the right of action is given by the statute. * * *

In 28 Am. Jur. 49 the following appears:

"The phrase, 'receivable by the executor,' as used in the United States Revenue Act means 'collectable by the executor for distribution' under the laws of the jurisdiction pursuant to which he acts; and, in view of this rule, the proceeds of life policies aggregating less than \$40,000 cannot be regarded as a part of the insured's gross estate, although made payable to his estate, where, under the applicable state laws, such proceeds do not become a part of the general estate, or subject to the claims of creditors, but pass, through the executor as a mere conduit, to the statutory beneficiaries, who take a vested interest as of the time of the insured's death, free from the claims of creditors."

(Underscoring ours)

In an opinion by this office, dated January 26, 1937, addressed to R. J. Green, the same question was presented. It concerned the applicability of the Missouri Inheritance Tax to damages received under the Federal Employers' Liability Act. This act is similar to the Missouri Death Act in its major provisions. This office ruled as follows:

"In view of the foregoing, it is the opinion of this department that money received as damages under the Federal Employers' Liability Act by a personal representative of a deceased employee is not subject to tax under the inheritance tax laws of Missouri."

In passing, we refer to the statement in the appraiser's letter that he understands that the administrator is the only person permitted to bring this action, and we quote from Cummins v. Kansas City Public Service Co. 66 S.W. (2d), 1.c. 926:

* * * An administrator is not entitled to

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bring suit for the benefit of the next of kin if other designated beneficiaries do not do so within a definite time, as minor children are; therefore, it is not unreasonable to hold that he may do so only when there are none of the designated beneficiaries, who did suffer actual loss surviving at the time of the death. The same construction, as to similar beneficiaries, has since been put upon the Federal Employers' Liability Act (45 USCA Secs. 51-59) by the Supreme Court of the United States. * * * "

CONCLUSION

It is therefore the opinion of this office that damages recovered under the wrongful death statutes of this state are not subject to the Missouri Inheritance Tax.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. Taylor,
Attorney General.

HJD:cg

INSANE PERSONS: Insane persons are entitled to an adjudication of their mental capacity by the Probate Court to determine the necessity of appointing a guardian even when they have been acquitted of a criminal charge by reason of insanity.

FILED NO. 33

May 3, 1950



Hon. R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Mr. Gifford:

Your letter of recent date requesting an opinion of this department being of considerable length, for brevity's sake, will be incorporated herein by reference. The question presented therein is:

When a person has been acquitted by a jury upon a trial of a criminal case by reason of insanity and the jury further finds that such insanity still exists, and at a later date the Circuit Court upon the verdict of the jury, orders the defendant conveyed to a State Hospital for care and treatment of the insane and the cost of conveyance to and maintenance while in said hospital be paid by defendant's guardian out of defendant's property, if he has property, then, must the Probate Court, upon request, appoint a guardian for such insane person without holding a hearing?

Section 4047 and 4049 of the Revised Statutes of Missouri, 1939, provides the procedure in the Circuit Court when a person has been acquitted of a criminal offense by reason of insanity and the disposition of such person.

Section 4047, supra, reads as follows:

"If upon such inquiry the said jury shall become satisfied that such person has so become insane, they shall so declare in their verdict, and the court shall, by proper warrant to the sheriff, marshall or jailer, order such person to be conveyed to the hospital for the care and treatment of the insane and there kept until restored

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to reason. And such person shall be there-upon disposed of, and the costs and expenses of conveying him to said hospital and of his support and maintenance at said hospital shall be taxed, paid and collected as now or hereafter provided by law in cases of the insane poor: Provided, if such person shall be adjudged to be insane and shall have property, the costs shall be paid out of his property by his guardian."

Section 4049 reads as follows:

"When a person tried upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such insanity, he shall be discharged from custody; but in case the jury shall find such person has not entirely and permanently recovered from such insanity, the prisoner shall be dealt with as provided in the two preceding sections."

Chapter I, Article 18 Administration. Section 451, R. S. Mo., 1939 provides for the appointment, when, and reads as follows:

"If it be found by the jury or the court sitting as a jury that the subject of the inquiry is of unsound mind and incapable of managing his or her affairs, the court shall appoint a guardian of the person and estate of such insane person, such guardian to be a resident of the state; and if the person so found to be of unsound mind is, at the time of the finding, a duly qualified public officer of this state, or of any county in this state, or of any municipality in this state, such office shall be deemed vacant, and it shall be the duty of the judge of the probate court holding such inquiry

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to certificate the fact of such finding to the officer or tribunal having power to fill such vacancy; and the vacancy shall be filled during the insanity of such officer; Provided, that if the insane person be the judge of probate in any county, then the inquiry herein provided for shall be had before the county court of said county."

Section 497, R. S. Mo. 1939, with reference to when an insane person may be confined reads as follows:

"If any person, by lunacy or otherwise, shall be furiously mad, or so far disordered in his mind as to endanger his own person or the person or property of others, it shall be the duty of his or her guardian, or other person under whose care he or she may be, and who is bound to provide for his or her support, to confine him or her in some suitable place until the next sitting of the probate court for the county, who shall make such order for the restraint, support and safekeeping of such person as the circumstances of the case shall require."

Section 498, R. S. Mo. 1939, with reference to orders for confinement of insane persons by certain officers reads as follows:

"If any such person of unsound mind, as in the last preceding section is specified, shall not be confined by the person having charge of him, or there be no person having such charge, any judge of a court of record, or any two justices of the peace, may cause such insane person to be apprehended, and may employ any person to confine him or her in some suitable place, until the probate court shall make further orders therein, as in the preceding section specified."

Section 9351, R. S. Mo. 1939 with reference to confining insane persons by sheriff and the payment of costs reads as follows:

"The sheriff or other officer having the custody of insane persons, as required in sections 9349 and 9350, shall if he deem it necessary to their safe custody, confine them to the county poorhouse or county jail until they shall be removed to a state hospital; and if all things needful be not

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otherwise supplied, he shall furnish them; and in such cases, the supplies for the insane poor shall be paid for by the proper county courts out of the county Treasurer; and supplies for others than the insane poor shall be repaid out of their estates; and may be recovered by suit in the name of such officers."

In this instant case, apparently we are not dealing with an indigent insane person, but rather an insane person who is possessed of certain property sufficient at least to pay for his transportation and maintenance to the State Hospital and for that reason we will not refer to indigent insane persons in this opinion.

In the case of *In Re Moynihan*, 62 S. W. (2d) 410, 1. c. 418, 332 Mo. 1022, the Supreme Court of the State of Missouri said:

"* * * * 'As the inherent jurisdiction of the state over persons of unsound mind rests in part upon its duty to protect the community from the acts of those who are not under the guidance of reason, it follows, * * * that if any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person, but only during so long a time as maybe necessary to institute and carry to a determination proper proceedings to inquire into the party's condition and provide for his legal custody.' Buswell on Insanity, p. 33, §23. See, also notes, 10 A. L. R. 488, and 45 A. L. R. 1464. But, even in such circumstances, it should be remembered that the preliminary order authorized by sections 498, 499, R. S. 1929, is not a valid final adjudication of the fact of insanity. The hearing provided by section 452, R. S. 1929, (Mo. St. Ann. § 452), must still be had, and the person suspected of insanity still 'is entitled to be present at said hearing and to be assisted by counsel,' as stated in the notice required by section 450, R. S. 1929, (Mo. St. Ann. §450). The practice of sending a person to an insane

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asylum before the hearing might result in preventing the person claimed to be insane from employing counsel or being present at the hearing. * * * * *

(Underscoring ours)

In the case of Ruckert v. Moore, 295 S. W. 794, 1. c. 798, the Supreme Court of the State of Missouri said:

"An insanity proceeding is in invitum, and seeks to deprive the citizen of his liberty or property, or both. Such proceeding seeks to take away from the citizen not only his right to the possession of his own property, but also his right to contract freely with respect to his property, and to dispose of and do with it as he will. Therefore, it is said:

"Where a statute prescribes a certain method or procedure to determine whether persons are insane, such inquiries must be conducted in the mode prescribed, and the statute regulating such proceedings must be followed strictly." 14 R. C. L. 556, 557.

"Proceedings for an adjudication of insanity against an individual are required to be in strict compliance with the statutory requirements." 32 C. J. 634.

"The statute of this state relating to insanity proceedings (section 444, R. S. 1919) provides:

"If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into

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by a jury; Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury.'

Section 446, R. S. 1919, provides:

"'In proceedings under this article, the alleged insane person must be notified of the proceeding by written notice stating the nature of the proceeding, time and place when such proceedings will be heard by the court, and that such person is entitled to be present at said hearing and to be assisted by counsel, such notice to be signed by the judge or clerk of the court under the seal of such court, and served in person on the alleged insane person a reasonable time before the date set for such hearing.'
(Italics ours.)"

Again in the same case at l. c. 800, the court said:

"The general rule is that, to authorize the appointment of a guardian for an alleged incompetent person, his incompetency must first be adjudicated by the tribunal having jurisdiction in such cases. 32 C. J. 653. Such is the clear direction and intent of our statute (Section 448, R. S. 1919) which provides:

"'If it be found by the jury or the court sitting as a jury that the subject of the inquiry is of unsound mind and incapable of managing his or her affairs, the court shall appoint a guardian of the person and estate of such insane person, such guardian to be a resident of the state.'"

In the instant case the jury in the trial of the criminal case acquitted the defendant by reason of insanity. The Circuit Court in conformity with that verdict made an order directing the defendant to be conveyed to the State Hospital for care and treatment of the insane and the expense of such conveyance and maintenance be paid out of his property by his guardian.

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The Circuit Court, in accordance with the verdict did all that it could do under the law in such case and made an order accordingly, but the verdict of the jury, in the trial of the criminal case, did not make the finding that the defendant was incompetent and incapable of managing his or her business and affairs which is essential to the appointment of a guardian by the Court. The defendant, however, can be confined in the State Hospital on the order of the Circuit Court and there kept until his or her condition warrants the superintendent of the institution to discharge such patient.

In the appointment of a guardian by the Probate Court it is necessary to hold a hearing to determine the person's competency to managing his property, business and affairs and this action can be instituted in the Probate Court after confining the defendant in a State Hospital.

Under the order of the Circuit Court, the sheriff or prosecuting attorney may, if it is thought advisable, institute a proceeding in the Probate Court to have the defendant adjudged incompetent. The defendant should be served with notice of the hearing, the same as though competent, and is entitled to a hearing as in other cases and if the Probate Court finds him incompetent, a guardian should be appointed. If the hearing results in a finding that the defendant is not of unsound mind, it would determine only the fact relative to the proceeding for the appointment of a guardian and would not affect the confinement under the order of the Circuit Court.

If the Probate Court should find that the defendant is capable of managing his business and affairs and declines to appoint a guardian, then action could be instituted in the Circuit Court to recover the cost of transportation and maintenance of the patient in the State Hospital and the Circuit Court could appoint a guardian ad litem to represent the defendant in such matter.

In the case of *Graves v. Graves*, 255 Mo. 468, 1.c. 482, it is said:

"Likewise where a guardian or committee has not been appointed, or if appointed refuses to qualify or has been removed, a guardian ad litem should, upon a proper suggestion or petition, be appointed to defend in the name of the insane person, even though defendant has not been judicially declared insane, if the fact of insanity is shown by affidavit or otherwise. A guardian ad litem so appointed is under the direct control of the court, and may make any defense either by way of answer or cross bill or both that occasion may require or the court may order." (Underscoring ours.)

"This court has specifically recognized the rule in the case of *Bensieck v. Cook*, 110 Mo. 1.c. 183, whereat we said:

Hon. R. M. Gifford

"The trial court pursued the right course in appointing a guardian ad litem for defendant, Joseph Cook. (Mitchell v. Kingman, 5 Pick. 431; Buswell on Insanity, sec. 132; Sturges v. Longworth, 1 Ohio St. 544.) And the power of the court to appoint such a guardian, of necessity, concedes the power of the court, upon the proper basis of facts being presented, to render a judgment as binding on the lunatic and his property interests, as a similar judgment would be upon a sane person.'"

As stated above, relative to the appointment of a guardian ad litem, where there has been no judicial finding of insanity, the same rule would apply and the court could appoint a guardian ad litem for the person, where he had been found to be of unsound mind by the verdict of the jury in the defense of a criminal case.

Therefore, it will be necessary to hold a hearing in the Probate Court, and to accord the defendant his constitutional rights of being present and represented, and have an adjudication of his or her mental capacity to managing his or her business and affairs in order for a guardian to be appointed by the Probate Court and the Probate Court can only appoint a guardian after such adjudication and determination.

CONCLUSION

Therefore, from the foregoing it is the opinion of this department that a defendant is entitled to a hearing as provided by statute in the Probate Court to determine his or her mental capacity to manage his or her business and affairs prior to the appointment of a guardian.

Respectfully submitted

GORDON P. WEIR
Assistant Attorney General

APPROVED

J. E. TAYLOR
ATTORNEY GENERAL

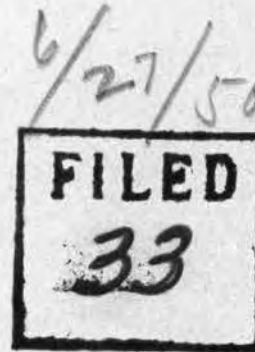
CIRCUIT COURTS:
SALARIES AND FEES:

Circuit Judge of the Second Judicial Circuit
entitled to receive the change of venue fees in
cases which were tried and finally disposed of
by said judge prior to July 1, 1946.

June 26, 1950

Honorable James Glenn
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:



I.

This will acknowledge receipt of your letter of June 15, 1950, requesting an opinion of this department. This request reads as follows:

"I am in receipt of the two opinions enclosed in your letter of June 13. Our Circuit Judge is of the opinion that the questions presented in my prior letter to you are not sufficiently answered by the opinions enclosed by yourself.

"I think the only question remaining is whether the Circuit Judge is entitled to change of venue fees in those cases which were tried and disposed of prior to January 1, 1946, but which the Circuit Clerk failed to remit to him prior to that date."

II.

Section 1074, R. S. Mo. 1939, provides as follows:

"The clerk of any circuit court receiving with any transcript said sum of ten dollars shall pay said sum to the judge of the circuit court, or to any special judge trying such case, after a trial had or upon the final disposition of such cause in said court: Provided, that if no change of venue is granted, the money paid under this and the preceding section shall be returned to the party or parties paying the same: Provided, however, that all moneys received by the clerk of the circuit court of the city of St. Louis, under and by virtue

Hon. James Glenn

of the provisions of this and the preceding section, shall be paid by him into the city treasury, and used for the payment of the salaries of the circuit judges and court stenographers of the said city."

This section has been repealed by House Revision Bill No. 2118 of the 65th General Assembly. The committee on legislative research stated in regard to Section 1074:

"Since by Laws 1945, page 1522, S. 6, judges are given a stated salary as total compensation, the above provision allowing the ten dollars to a judge of the circuit court is impliedly repealed. Therefore it is suggested that section 1074 be repealed and reenacted only allowing the ten dollars to go to special judges. This necessitates a further change in the section so that whenever a regular judge serves the sum will go into the county treasury."

Our office on August 20, 1946, in an opinion to Honorable O. O. Brown, Judge of the 26th Judicial Circuit, held that said section 1074 was repealed by reason of the irreconcilable conflict with S.C.S.S.B. 442, now Laws 1945, page 1522. This law was approved July 13, 1946, and became effective October 6, 1946.

Section 24 of Article V of the Missouri Constitution of 1945 provides as follows:

"Salaries and Compensation of Judges--Provision against Other Special Compensation and Practice of Law--Travel and Other Expenses--Fees.-- All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and

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magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

Section 2 of the Schedule of the Missouri Constitution of 1945 provides as follows:

"Sec. 2. Effect on Existing Laws.-- All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Section 5 of the Schedule of the Missouri Constitution of 1945 provides as follows:

"Sec. 5. Effect on Existing Rights, Claims, Etc.-- All rights, claims, causes of action and obligations existing and all contracts, prosecutions, recognizances and other instruments executed or entered into and all indictments which shall have been found and informations which shall have been filed and all actions which shall have been instituted and all fines, taxes, penalties and forfeitures assessed, levied, due or owing prior to the adoption of this Constitution shall continue to be as valid as if this Constitution had not been adopted."

The Supreme Court of Missouri has held in the case of Cunningham v. Current River R.R. Co., 165 Mo. 270, l.c. 277, 65 S.W. 556, as follows:

"* * *The ten dollars whose payment is required to be made on the presentation of an application for a change of venue from the circuit where the cause is at the time pending, is not intended and is in fact in no sense an increase in the salary of the judge to whom it is to be paid, but compensation for extra labor imposed upon him by the person on whose application the venue is changed by reason of the cause being sent to him from another circuit.

"The compensation mentioned in the Constitution means compensation paid by the State, or some

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subdivision thereof, in the way of an increase of salary or compensation, which can not be increased by legislation during the period for which the judge is elected, but does not mean that he may not be paid for extra services and expenses incurred in the performance thereof, even out of the State treasury."

The Supreme Court of Missouri in the case of State vs. Farmer, 196 S.W. 1106, 271 Mo. 306, said:

"The facts are few and simple, and touching them there is no dispute; they run substantially thus: Relator is now, and has been since the 1st day of January, 1911, clerk of the circuit court of Callaway county. He is now serving his second term as such clerk; the term for which he was first elected having expired on the 31st day of December, 1914. On the 1st day of January, 1915, having been re-elected, relator duly entered upon his second term as such circuit clerk.

"It is conceded by the pleadings that pursuant to the method pointed out by statute for ascertaining the population of Callaway county, said county contains between 25,000 and 30,000 population. At the September term of the county court of Callaway county, relator, in all things following the provisions of an act of the Legislature, passed in 1915, and approved March 22, 1915, and which act pursuant to the express provisions thereof took effect July 1, 1915, presented to the county court his account for salary as circuit clerk for the month of August, 1915, accompanied by reports in proper form. Defendants refused to order, or to issue and sign a warrant for relator for such salary, on the ground that the act of 1915 which had put all circuit clerks of this state upon a salary basis of compensation, was unconstitutional. * * *

The court held, l.c. 1109:

"For since all of us have been lawyers in active practice, we judicially notice the delays incident under our practice, statutes, and system of appellate review between the earning of fees by a circuit clerk and his actual collection thereof. Payments

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of costs, which include the fees of circuit clerks, are delayed in a large number of cases till an appellate court has passed finally upon the case. Hence it is (and the annually increasing collections of relator above set forth clearly illustrate this fact) that the yearly sums collected by a circuit clerk increase annually till a maximum is reached; such increase being due to the belated coming in of fees earned, but not collected, till after the determination of appeals. Sometimes we know fees are not actually collected by a circuit clerk till years after he has gone out of office, though actually earned by him when he was an officer. We have held that he could apply an excess collected over the statutory limit in one year to a deficiency under that limit for another year (Allen v. Cowan 96 Mo. 193, 9 S.W. 587), which holding accentuates the thought that the Legislature was not far wrong in denominating as salary the annual statutory stipend of a circuit clerk."

The Supreme Court in the case of Smith v. Pettis County, 136 S.W.2d 282, 345 Mo. 839, held:

"The fees collected by probate judges are of public record. We must assume that the legislature was familiar with them when they adopted these provisos. We may also assume that the legislature was familiar with probate practice in a general way. For instance, that estates could not be finally settled until after a lapse first of two years and now of one year. Where there is litigation estates remain open for indefinite periods. Estate of minors under guardianship may remain open for almost twenty-one years; estates of insane persons much longer. Therefore, the collection of fees previously earned may be long postponed. It would be and is unlikely that sufficient fees could be collected in the first years or perhaps during the entire four years of the term to reach the amount allowed. Moreover, a probate judge is specifically prohibited by this same section from collecting fees in advance. Before the limitation of these provisos was imposed probate judges would continue to collect fees long after the expiration of their terms. These matters all must have been considered. This court itself has judicially noticed the delays which ensue between the time a circuit clerk earns his fees

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and his actual collection of them in State ex
rel. Emmons v. Farmer, 271 Mo. 306, 196 S.W. 1106."

* * * * *

"* * * A probate judge may only collect fees for services which he has already performed. These services may be performed only while he is in office. His fees can accrue only while he is in office. These provisos only limit what he may keep. We said in Corbin v. Adair County, 171 Mo. 385, 71 S.W. 674, that a circuit clerk can demand and recover his uncollected fees from his successor. A suit for fees against a clerk's successor was upheld in Lycett v. Wolff, 45 Mo. App. 489.


"* * * The fact that Judge Smith succeeded himself in office in no way affects our conclusions * * *."

From the above and foregoing cases it is clear to us that the circuit judge of Macon county, Missouri, is entitled to recover his uncollected change of venue fees from the circuit clerk in those cases which were tried and disposed of by said circuit judge prior to July 1, 1946.


CONCLUSION

It is the opinion of this department that the Circuit Judge of the Second Judicial Circuit is entitled to receive the change of venue fees in cases which were tried and finally disposed of by said judge prior to July 1, 1946.

APPROVED:


J. E. TAYLOR
Attorney General
SJM:mw

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

SCHOOLS: TOWNSHIP TRUSTEES:

Township trustee has no authority to disburse school funds of his township after formation of consolidated district under provisions of Section 1, Laws of 1947, Vol. II, Page 371; must turn over all such funds in his hands to treasurer of enlarged district, and is not entitled to a commission for such turnover.

July 13, 1950

Mr. R. M. Gifford
Prosecuting Attorney
Sullivan County
Green City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting a legal opinion of this department. Said request reads as follows:

"On the 23rd day of August, 1949, an election was held in the northwest part of this County for the purpose of enlarging and bringing together several districts in Sullivan and an adjoining County. As a result of that election Consolidated District No. 4 was formed and the new board of that district was organized and a treasurer thereof elected on September 29, 1949.

"Sullivan is a County operating under township organization and the Trustee of a township from which part of the new school district was carved, received through the County Treasurer monies for school purposes including districts within the new enlargement and later disbursed them to the treasurer withholding therefrom his commission as trustee. Now the Treasurer of Consolidated District No. 4 makes demand from said Trustee the amount of such commission withheld on the theory that the disbursement should have been from the Treasurer directly to him as Treasurer rather than to the Trustee of that township.

"Will you please advise as to whether the Trustee should account to the Treasurer for the commission withheld in his official capacity."

Section 10400, Laws of Missouri, 1945, page 1708, provides that the county treasurer, and in counties operating under township organization the township trustee, shall be the custodian of the school moneys belonging to such township and reads as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, in which counties the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on his election, before entering upon the duties of his office, he shall give a surety company bond, with sufficient security, in the probable amount of school moneys that shall come into his hands, payable to the State of Missouri, to be approved by the county court, and paid by the county court out of the county common school funds, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over the amount of the security available in the bond; and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury: Provided that the county treasurer in any county of the third class or fourth class may furnish either a personal or surety bond and in case a surety bond is required by the county court in said county, said surety bond shall be paid for by said county."

The facts as given in your letter do not indicate whether the township trustee received the school money before or after the formation of the new district. In the event the receipt of the money was before the formation of the enlarged district, then the payment was proper. The provisions of Section 10400 make it the duty of the township trustee in counties operating under township organization to be the custodian, and to disburse all school moneys of his township upon the written order of the clerk of such township.

In the event the County Treasurer of Sullivan County paid the school moneys in question to the township trustee of one of the townships included in the enlarged district subsequent to the formation and the election of officers of said school district, such payment was not only improper but it was clearly a violation of Section 11, Laws of Missouri, 1947, page 376, which section superseded Section 10400, supra, insofar as the custody and disbursement of school funds in the hands of the township trustee are concerned. Said section reads in part as follows:

"* * * All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district, * * *"

We are not particularly concerned here with whether the custody of the school funds by the township trustee were legal or illegal, since this would be a question of fact as to when the money was paid, and whether it had been paid to the proper officer who was then legally authorized to receive and disburse it according to law, but we are very much concerned with the proposition as to whether the action of the trustee in withholding a part of school funds turned over to the treasurer of the enlarged district was legal or illegal, and as to whether the funds withheld should be paid over to the treasurer of the enlarged district, and it is to this phase of the question presented that we will direct our remarks hereafter.

Under the provisions of Section 10400, supra, for the receipt and disbursement of the school money of the different districts of his county, the county treasurer shall be allowed such compensation as the county court may deem advisable, but not to exceed one half of one per cent of all school moneys disbursed by him, such compensation to be paid out of the county treasury. This section further provides that in those counties having adopted township organization under statutes pertaining thereto, that the township trustee is the proper officer to receive and disburse all

school moneys of his township and in so doing he shall be subject to corresponding duties as a county treasurer in a county not operating under township organization.

For his services in this connection a county treasurer is entitled to receive the compensation fixed by section 10400, supra, but no provision is made for paying the township trustee any compensation for performance of his duties, and it does not follow that he will receive the same compensation as the county treasurer, in the absence of express statutory provisions authorizing the payment of such compensation.

While the township trustee is not authorized to receive compensation under the provisions of Section 10400, supra, we contend that he is not precluded from receiving compensation, and that for the receipt and disbursement of the school moneys of his township he may be allowed compensation under the provisions of another statute.

Section 13987, Mo. R.S.A. 1939, lists the officers and fixes the compensation each is entitled to receive in those counties operating under township organization and reads as follows:

"The township clerk, as clerk, the township trustee, as trustee, members of the township board, and judges and clerks of election, shall each receive for their services two dollars and fifty cents per day: Provided, that the township clerk shall receive fees for the following, and not per diem, for serving notices of election, or each: For filing any instrument of writing, ten cents; for recording any order or instrument of writing, authorized by law, ten cents for every hundred words and figures; for copying and certifying any record in his office, ten cents for every hundred words and figures, to be paid by the person applying for the same; and provided further, that the township trustee as ex officio treasurer shall receive a compensation of two per cent for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent of all sums over said amount."

While this section does not specifically refer to the township trustee's fees for disbursing the school moneys, it appears that the language of the statute "for receiving and disbursing all moneys coming into his hands," is sufficiently broad enough to include compensation for disbursing school funds. Our contention is further substantiated by the holding of an official opinion of this department furnished the Honorable Forrest Smith, State Auditor of Missouri, and bearing date of July 9, 1947.

In said opinion it was held that the compensation of a township trustee and ex officio treasurer of a county operating under township organization is payable out of the general revenue fund of the township and that his commissions are based on the total amount of all funds received and disbursed and are to be calculated on the basis of two per cent of the first \$1000.00 of such total and one per cent balance of such total. We are enclosing a copy of this opinion for your consideration.

We assume that the "disbursement" for which the trustee claims compensation refers to the turning over of the total amount of the funds in his hands to the treasurer of the enlarged district. If we are to be guided by the interpretation placed on the various sections of the statutes by the township trustee, then he will no doubt be entitled to whatever fees that were claimed and withheld by him. However, we cannot agree with his interpretation of such statutes, and contend that under no strained interpretation of any statute was there a "disbursement" of the funds in question for which the trustee was entitled to receive commission particularly under the provisions of Section 13987, *supra*.

According to the definition found in Webster's New International Dictionary, the word "disburse," means to pay out; to expend, usually from a public fund.

Here there was merely a change in custody of the funds from the trustee to the treasurer of the enlarged district, the funds were not paid out, or spent, but were still intact and in the custody of the proper officer, in the treasury, and undisbursed.

In this connection and to support our theory as above stated we desire to call attention to the case of: State ex rel. Thompson, State Treasurer vs. Board of Regents for Northeast Missouri State Teachers College, 264 S.W. 698, at l.c. 701, the court said:

"* * * Certainly it cannot, under any rule of construction, be held that a payment into the state treasury of incidental fees received by the college is in any sense a disbursement. Even the tyro in the use of our mother tongue attributes no other meaning to the word than to pay out or expend. A payment into the treasury, therefore, cannot be so classified, as it simply effects a change in the custodian and the place of deposit of the fund."

Even though it were to be admitted the trustee had actually disbursed the school funds and was entitled to receive a fee for such disbursement, the facts do not indicate the amount of the commission claimed and withheld by him. No statute is cited by him as authority for the allowance of the claim and in the absence of such statutory provision he is not entitled to any commission, as a public officer's compensation for services rendered are not presumed to be due him in the absence of statutory provisions

allowing same. If the fees had been legally due he was not authorized by any statute to withhold them from the school moneys, as such fees were to be paid from the general revenue of the township and not from the school funds.

In the case of Sanderson vs. Pike County, 195 Mo. 598, involving a law and facts similar to those before us, the plaintiff, a county treasurer of Pike County sued said county to recover fees for disbursing the school funds of the county, the court said at l.c. 605:

"It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it.* * *"

The withholding of such commissions alleged to be due the township trustee was clearly illegal, and the treasurer of the new enlarged district is within his legal rights in demanding that the funds withheld be turned over to him at once, and that the treasurer of the enlarged district is in a position to institute legal proceedings against the defaulting trustee in an effort to recover said funds for his district if his demands are not complied with by such trustee.

CONCLUSION

It is therefore the opinion of this department that a trustee of a township in a county operating under township organization is the proper officer to disburse all school moneys belonging to his township received from the county treasurer of such county prior to the formation of an enlarged school district under the provisions of Senate Bill #307, Laws of Missouri, 1947, p. 370, Vol. II, where said district is composed of school districts located in said county and other districts in an adjoining county not operating under township organization. That for the receipt and disbursement of township funds including school funds, the township trustee shall receive for his services the commission provided by Section 13987, Mo. R.S.A. 1939, which is based upon the total amount of funds received and disbursed by him and is calculated on the basis of two per cent of the first \$1000.00 of such total and one per cent of the balance of such total.

That it is the further opinion of this department that after the formation of an enlarged district composed of school districts located in a county operating under township organization and other districts located in an adjoining county not operating under township organization, that the right of a trustee of a township in the former county to receive school funds of his township from the county treasurer of said county, to disburse, and to receive a commission for such disbursement ceases, and that it shall be the duty

of such trustee to immediately turn over all school funds of his township to the treasurer of the enlarged district. That such turnover of the funds is not a disbursement within the meaning of Section 13987, supra, and the trustee is not entitled to any commission for same and he may not withhold any part of said funds as commissions alleged to be due him but must account to the treasurer of the enlarged district for all of such funds in his hands.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:

J.E.TAYLOR
Attorney General

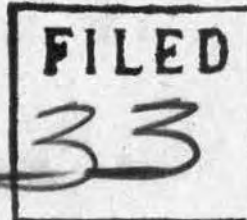
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INHERITANCE TAX) Deferred payment of inheritance tax under law prior to
Laws of 1921, page 110, bears interest at rate of six
per cent per annum from death of decedent until pay-
ment of tax. Inheritance tax supervisor may not com-
promise claim for such interest.

August 15, 1950

8/18/50

Mr. C. L. Gillilan
Assistant Supervisor
In Charge of Inheritance Tax
Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I am enclosing herewith a self-explanatory letter from Mr. O. M. Lambur, from the trust Department of the Mississippi Valley Trust Co. relative to the above estate; also copy of letter bearing date of Jan. 24, 1921, signed by Stratton Shartel, Ass't. Attorney General, which will explain the position of the Attorney General's Office at that date.

"Tax liability in this estate was definitely determined in the original assessment and there is no question of a re-determination of tax liability at this time. The only question involved here is liability for interest on deferred payments."

The letter from Mr. Lambur, referred to in your opinion request, is as follows:

"Mr. Samuel E. Hoffman died on the 3rd day of May, 1920 leaving a last Will and Testament which was probated on the 18th day of June, 1920 and on the 1st day of October, 1920 the Probate Court appointed an inheritance tax appraiser who filed his report on the 18th day of October, 1920, which was approved by the Court and an order assessing the tax was entered, as per Exhibit 'A' hereto attached.

Mr. C. L. Gillilan

"In the aforesaid proceedings a tax of \$585.00 was assessed against a legacy of \$20,000.00 to Louise Scott Simpkins which was paid and a further tax of \$4,219.83 was assessed against the contingent life interest of Louise Scott Simpkins and inasmuch as her interest might never vest in possession or enjoyment, she elected, under the then effective provisions of Section 562, Revised Statutes of Missouri 1919, not to pay said tax until she came into actual possession and enjoyment of the property and therefore filed in the Probate Court a bond in the amount of \$14,414.49 with the Aetna Casualty and Surety Company as security, which bond was approved, by the Probate Court on the 30th day of October, 1920. (a photostatic copy of the form of the bond as renewed on October 29, 1930 is attached as Exhibit 'B'.)

"Mrs. Louise Scott Simpkins, on the date of death of Samuel E. Hoffman, became a contingent life beneficiary under his Will in the residue of his estate subject to a preceding life estate of Ruth Scott, which estate was to vest in Mrs. Simpkins only in the event she survived said preceding life tenant. Mrs. Ruth Scott died a resident of the City of St. Louis, Missouri on the 25th day of May, 1950, being survived by Mrs. Simpkins, thus vesting the later's interest in this estate in actual possession and enjoyment.

"Pursuant to Section 562, Revised Statutes, 1919, as aforesaid, said tax of \$4,219.83 is now due and payable.

"On June 21, 1950 Mrs. Simpkins filed a petition in the Probate Court offering to pay the sum of \$4,219.83 originally assessed claiming that no interest or penalties had accrued thereon and requesting an order directing her to pay said amount in full satisfaction of all tax due. The Probate Court has not acted on said petition but has

Mr. C. L. Gillilan

suggested that no reassessment of tax is required and that the payment of said tax and release of said bond might be effected through your office and requested that the matter be taken up with you.

"Under circumstances set out more fully in a letter of even date regarding the Estate of Horace L. Brady we discussed this matter with you and on behalf of Mrs. Simpkins we are offering to pay the sum of \$6,705.58 in full satisfaction of this tax. This sum is the principal amount of the tax plus 2% interest on 97½% of the balance from May 3, 1920, the date of death of Samuel E. Hoffman. This interest rate is arrived at by considering the average rate of return on the entire estate and the premium cost of the bond for the thirty year period.

"This offer is made purely as a compromise and is not an abandonment of the position that no interest is due and is made without prejudice to this or any other point that may be involved in finally determining the amount to be paid in full satisfaction of the tax claim.

"We would appreciate a prompt answer in this case as the tax liability makes the payment of current income to Mrs. Simpkins dubious and she requires this income to meet her living expenses. If this offer is not acceptable we would appreciate any suggestions you can make as to the way in which the tax liability can be finally determined as the question is causing serious embarrassment in the administration of the Trust. This offer is made with the understanding that it will not be binding until a final agreement is reached which will be acceptable to the Probate Court and the Surety Company and that it may be withdrawn at any time."

The letter signed by Stratton Shartel is as follows:

"In re matter of deferred payment collateral

Mr. C. L. Gillilan

inheritance tax, Estate of Samuel E. Hoffman, deceased.

"We are in receipt of your letter of January 7th, enclosing the bond of Louise Scott Simpkins for the purpose of deferring payment of the tax. The conditions of the bond should include not only the payment of the tax, but also the payment of six per cent interest upon the tax from the date of the death of decedent, and we are therefore returning the bond to you for correction. Kindly have this correction made and the bond returned to us at your early convenience."

Section 577, R. S. Missouri, 1939, provides:

"When any property, interest therein or income therefrom belonging to any estate in course of administration, shall pass or be limited for the life of another or for a term of years, or to terminate on expiration of a certain period, the property so passing shall be appraised immediately after the death of the decedent and the value of said life estate, term of years or period of limitation, shall be valued according to mortality tables, using the interest rate or income rate of five per cent, and the value of the remainder in said property so limited shall be ascertained by deducting the value of the life estate, term of years or period of limitation from the clear market value of the property so limited and the tax on the transfer of the separate estate or estates, remainder or remainders, or interest shall be immediately due and payable, to the state treasurer together with interest thereon and said tax shall accrue as provided in section 578 of this article and remain a lien upon the entire property until paid: Provided, that the persons, institutions, association or corporation beneficially interested in property chargeable with said

Mr. C. L. Gillilan

tax may elect not to pay the same until they shall come into actual possession or enjoyment of such property, then in that case said person, association or corporation shall give bond payable to the state of Missouri, in a penal sum three times the sum or amount of taxes due upon such transfer, with such sureties as the probate court, or any other court having jurisdiction of the matter, may approve, conditioned for the payment of said tax and interest thereon from the date such tax is due at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, which bond shall be executed in duplicate and one copy filed in the office of the probate judge of the proper county, and the other with the state treasurer: Provided further, that every person, institution, association or corporation shall make and file with the probate court of the county a full verified return of said property, or interest therein, within one year of the death of the decedent, with the bond and sureties as above provided; and provided further, said person, institution, association or corporation shall renew said bond every five years after the date of the death of decedent."

(Underscoring ours.)

The underscored words in the above quoted section "from the date such tax is due" were not found in Section 562, R. S. Missouri, 1919, which was in effect at the time of death of Mr. Hoffman. Those words were added by an act of the Legislature found in laws of 1921, page 110.

Section 578, R. S. Missouri, 1939, provides, in part, as follows:

"All taxes imposed by this article, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of six per cent per annum shall be charged and collected thereon for such time as said taxes are not paid, unless the payment of interest is

Mr. C. L. Gillilan

abated or time of payment extended by order of the probate court, because without negligence final assessment of tax cannot be made: Provided, that if said taxes are paid within nine months from the accrual thereon, or within the period of said extension for the payment thereof interest shall not be charged or collected thereon, and in all cases where the executor, administrator, or trustee does not pay such tax within one year from the death of the decedent they shall be required to give bond in the form and to the effect prescribed in section 577 of this article for the payment of said tax, together with interest at the rate of one per cent per month, unless abated or extended as aforesaid.
* * *

This section makes inheritance tax due and payable from the date of the death of the decedent and provides for interest at the rate of six per cent per annum for such time as taxes are not paid. At the time of the giving of the bond in this case the Attorney General had ruled that under the statute then in effect, the tax which had been determined bore interest at the rate of six per cent per annum until paid. This conclusion appears to be in accord with the statute in effect at that time.

In our opinion Section 562, R. S. Missouri, 1919, did not change the time at which the tax was due but merely postponed payment thereof upon giving of the bond provided in that section. Whether or not the 1921 amendment indicates an intention on the part of the Legislature to make the time the tax is due the time at which the beneficiary comes into actual possession or enjoyment of the property is not of moment here inasmuch as that amendment was made subsequent to the determination of the tax here involved. We are, therefore, of the opinion that interest is due on the amount of the tax at the rate of six per cent per annum from the date of the death of the decedent.

Mr. Lambur in his letter offers the payment of a sum in settlement of the claim for interest which is less than the six per cent per annum rate provided by law. We find no provision in the Missouri inheritance tax law authorizing the state official charged with the administration of the law to compromise any claim for inheritance taxes or interest thereon. The general rule is stated in 28 Am. Jur., Inheritance, Estate and Gift Taxes, Section 273, page 134, as follows: "The statutes sometimes authorize compromise settlements of taxes between a state tax officer and executors or trustees in certain cases. Any such compromise must find its source within the statute."

Mr. C. L. Gillilan

Applying such rule in this instance, there being no authority given you to accept a compromise offer such as that made here, we are of the opinion that you have no authority to accept such offer.

Section 578, R. S. Missouri, 1939, authorizes the probate court to abate interest under certain circumstances. Whether or not this is a proper case for such abatement is a matter for determination of the probate court, and, therefore, we will not attempt to pass on that question.

CONCLUSION

Therefore, it is the opinion of this department that where a bond was given in 1920 to secure the deferred payment of inheritance tax under Section 562, R. S. Missouri, 1919, the amount of such tax bears interest at the rate of six per cent per annum from such date until payment of the tax unless abated by order of the probate court. We are further of the opinion that the assistant supervisor in charge of the inheritance tax unit of the department of revenue has no authority to accept as a compromise of a claim for interest on such tax any sum other than that computed in accordance with the statute at the rate of six per cent per annum.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh

INHERITANCE) Supervisor may not accept compromise offer for
TAX) interest on tax. Interest must be abated by probate court.

September 8, 1950

9/11/50



Mr. C. L. Gillilan
Assistant Supervisor
In Charge of Inheritance Tax
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I am enclosing herewith self-explanatory letter from Mr. O. M. Lambur with the Trust Department of the Mississippi Valley Trust Co., together with copy of petition filed with the St. Louis City Probate Court seeking a re-determination of tax liability in the estate of Horace L. Brady; also recomputation of tax filed with the above petition which appears to be correct.

"The question under consideration is the liability of the surviving beneficiary under the trust for interest on deferred payment of tax; the payment of which is secured by bond (Section 577).

"Also involved is the authority of the Probate Judge to abate interest and penalties on final determination, or re-determination, of tax liability (Section 578, first paragraph)."

The letter from Mr. Lambur, referred to in your opinion request, is as follows:

"Mr. Horace L. Brady, a single man, formerly a resident of the City of St. Louis, Missouri,

Mr. C. L. Gillilan

died on May 31, 1940, leaving a last will and Testament which was duly admitted to Probate in the Probate Court of the City of St. Louis, Missouri, on or about June 3, 1940 and said Probate Court on June 6, 1940 issued Letters Testamentary to Warren F. McElroy and the Mississippi Valley Trust Company as Co-Executors of the Estate of said decedent.

"On the 15th day of June, 1942 the Executors filed with the Probate Court their final settlement and were duly and fully discharged as such Executors by order of the Probate Court on the 30th day of March, 1943.

"Under his last will and Testament, testator, after providing for payment of certain specific bequests to various legatees bequeathed and devised all the rest and residue of his estate to the trustees, however, to be held in trust in equal shares for those of his nieces and nephews therein mentioned, to-wit: Mrs. Pearl Cook, Mrs. Helene Brock, Elmer L. Brady, Chester L. Brady, Horace L. Brady, and Robert L. Brady, who might be living at his death and directed that the trust as to each of said shares of said residuary estate should continue for ten years after the death of testator and should thereupon terminate. Chester L. Brady and Horace L. Brady predeceased the testator and Mrs. Pearl Cook died on the 23rd day of March, 1944, Mrs. Helene Brock died on September 18, 1944 and Robert L. Brady died on the 7th day of June, 1948.

"On or about the 4th day of February, 1942 the duly appointed appraiser of said estate directed to fix and determine values of the property of said decedent and the inheritance tax owing the State of Missouri by said estate and the beneficiaries thereof, submitted his report to the Probate Court fixing the amount of tax in the sum of \$86,441.62, based on the highest contingency and the Probate Court did on the 3rd day of March, 1942, make an order assessing said amount of Missouri Inheritance Tax,

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(a copy of the appraiser's computation of the Missouri Inheritance Tax is attached hereto as Exhibit 'A').

"The Executors in their report submitted to the appraiser computed the Missouri Inheritance Tax at \$42,182.80 on the theory that the four nephews and nieces of the testator would survive on the date of termination of the trust and on the 27th day of March, 1942 the Executors paid a tax of \$42,182.80 and posted a surety bond in the penal sum of \$132,776.00 together with an escrow agreement to guarantee performance of such bond under which a deposit of approximately \$124,000 par value in United States Bonds, having an average yield of 2%, was made. The trust under the Will terminated on May 31, 1950 and in accordance with the terms and provisions of the Will of the testator the trustees will distribute the trust estate free of trust to Elmer L. Brady the last surviving nephew, and not to a stranger in blood.

"Attached hereto and marked Exhibit 'B' is the computation setting forth the correct method of a redetermination of Missouri Inheritance Tax which shows the total final tax due to be \$53,797.63 leaving a balance due of \$11,614.83.

"On June 5, 1950 very shortly after the termination of this trust the Mississippi Valley Trust Company as surviving trustee filed a petition in the Probate Court of the City of St. Louis, Missouri for redetermination of Missouri Inheritance taxes in accordance with Exhibit 'B' attached hereto. Said petition has not been ruled upon by the Probate Court because the Mississippi Valley Trust Company has taken the position that no interest is payable on the balance of the tax now due under the applicable statutes and that if any interest should be due the Probate Court has the power to abate any such interest. The Clerk and Judge of the Probate Court, in preliminary conferences, have indicated that they are of the opinion that interest is due at 6% from the death of Horace L. Brady, that the court has no power to abate such interest and that they are supported

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in this opinion by information received through your office.

"In a conference with us at your office several days ago, we believe that you said you thought interest was due at 6% but felt that the Court did have jurisdiction to abate the interest in connection with the redetermination of the tax.

"We are still of the opinion that no interest is due and no question of abatement is involved but we did recognize that the statutes are not clear and that as there are no decisions on the point the proposition is debatable.

"Under the circumstances we suggested that this might be a proper case in which to agree with your office on the assessment of the tax thus arriving at a compromise on a reasonable basis. No opinion was expressed by you as to the acceptability of a compromise but after some discussion it was agreed that we might submit any offer we desired to make through your office.

"As surviving trustee under the Will of deceased we are willing to pay the sum of \$13,909.29, being the amount of the tax due plus 2% interest on 97½% of said tax from May 31, 1940, date of the death of Horace L. Brady. We arrived at the interest figure by taking the average return on the \$124,000. par value United States Government Bonds we were required to keep in a segregated account to insure the payment of any tax subsequently found to be due.

"This offer is made purely as a compromise and it is not an abandonment of our position that no interest is due and it is made without prejudice to this or any other point that may be involved in the reassessment of the tax in the event this offer is not accepted by the State and the Probate Court.

"We would appreciate your prompt attention to this matter as our beneficiary is urging us to dispose of this matter as quickly as possible and if our

Mr. C. L. Gillilan

offer is not accepted it will be necessary for us to renew our negotiations with the Probate Court. We are making this offer with the further understanding that it will not be binding until accepted by the State and the Probate Court and that it can be withdrawn at any time prior to a final order assessing the tax in the Probate Court."

Under date of August 15, 1950, this office addressed to you an opinion in which we concluded that you, as the administrative official in charge of administration of the state inheritance tax law, have no authority to compromise claims of the State of Missouri in inheritance tax due the state or interest on such tax. The conclusion of such opinion is applicable here, and we feel, therefore, that you have no authority to accept the tendered compromise.

Section 578, R. S. Missouri, 1939, provides in part as follows:

"All taxes imposed by this article, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of six per cent per annum shall be charged and collected thereon for such time as said taxes are not paid, unless the payment of interest is abated or time of payment extended by order of the probate court, because without negligence final assessment of tax cannot be made: * * *"

According to Mr. Lambur's letter he intends to apply to the probate court to abate the interest in this matter, if you do not accept the compromise offer. In view of our conclusion that you have no authority to accept such compromise, we feel that application to the probate court is, under Section 578, quoted above, the proper manner in which abatement by reduction of the interest in this matter may be made.

CONCLUSION

Therefore, it is the opinion of this department that the administrator of the state inheritance tax law has no authority


Mr. C. L. Gillilan

to accept a compromise offer for interest on state inheritance taxes, and that the only manner in which such interest may be abated or reduced is by order of the probate court in accordance with Section 578, R. S. Missouri, 1939.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General



J. E. TAYLOR
Attorney General

RRW/feh

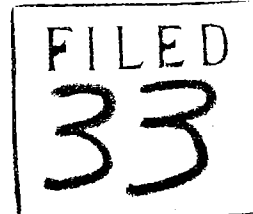
STATE INHERITANCE TAXES:

Inheritance tax
To be paid by life tenant and not
contingent remainderman, when.

FILED 33

November 10, 1950

Mr. C. L. Gillilan
Assistant Supervisor
Inheritance Tax Unit
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your recent letter requesting a legal opinion of this department regarding the proper assessment of state inheritance taxes in connection with the administration of the estate of Irving W. Kurtz, deceased, now pending in St. Louis County Probate Court. Reference is made to the letter of John F. Maloney, attorney, containing facts upon which the opinion request is based. Said letter reads as follows:

"I wrote to you recently in regard to this matter, but presume you did not receive my letter.

"I have been appointed to appraise the State Inheritance Tax in the above estate of Irving W. Kurtz, deceased.

"The will of the deceased provides a life estate for the widow in assets of the value of \$212,429.18. The remaining corpus, after her life estate, to be paid over to such persons as she may designate and appoint in her last will and testament. Upon her death, if she shall fail to exercise the power of appointment, the remaining corpus of the trust shall be added to and become a part of the residue of decedent's estate.

"It is my contention that the remainder, after the widow's life estate, should be added to the residue for inheritance tax purposes. The attorney for the estate contends that the full amount of the trust assets should be taxed to the widow.

"Kindly advise me at your earliest convenience, as to how this life estate should be taxed."

Upon referring to Article 8 of the Will, it appears that a trust was created, the assets of which consist of certain corporate stocks and certain real estate. The net income from this trust may be used for the benefit of the widow during her lifetime with the power to name (by her Will) those remainder-men who shall receive any corpus remaining in the trust property at her death, but in the event she should fail to exercise such power of appointment, then and in that event, such unapportioned corpus shall be added to and become a part of the residuary estate.

In the management of the trust property the trustees have been given very broad discretionary powers and the judgment of the trustees in such matters shall be conclusive on all persons. The trustees have also been given power to encroach upon the corpus of such property if in their judgment such action is necessary to enable them to obtain funds with which to provide for the comfort, support, maintenance and welfare of the widow in consideration of her station in life.

Article 14 of the Will reads as follows:

"I direct that my executors shall pay all inheritance, estate, succession and legacy taxes to which my estate or the transfer of any property hereunder may be subject and that such taxes be not deducted from any legacy herein provided and that the same be charged and paid out of my residuary estate under Article Ninth."

The question for determination in this opinion request is whether the full amount of the trust assets should be taxed to the widow or whether the remainder after her life estate shall be added to and become a part of decedent's estate for inheritance tax purposes.

Section 597, Mo. R.S.A., 1939, as amended Laws of 1943, p. 307, provides in part as follows:

"* * * When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is

transferred to a person or corporation, which under the provisions of this article is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in this article; Provided, further, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article. Such return of overpayment shall be made in the manner provided by section 584 of this article, upon the order of the court having jurisdiction. Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting."

From correspondence attached to the opinion request it appears that the testator has provided a life estate in assets of the estate of the value of \$212,429.18. While other specific devises and bequests have been made by Articles 1 to 7 inclusive of the Will, prior to the trust created for the widow in Article 8, it appears from the description of such devises and bequests that such devises and bequests constitute only a small part of the total value of the assets of the estate while the value of the widow's life estate constitutes a major portion of the total value of such assets.

There are no indications in the Will that the contingent remainder-men to be named by the widow are to receive anything aside from the residue from the trust after the widow's life estate, or, in the event the widow fails to name contingent remainder-men, the only large sum ever likely to be paid into the residuary estate is the residue from the trust fund. From the residuary estate the

inheritance taxes are to be first paid and then any balance of funds remaining are to be distributed among the legatees and devisees named in the Will. Therefore, it appears that any interest in the estate to be received by the contingent remaindermen, the residuary legatees and devisees, will depend upon whatever funds, if any, are available for that purpose remaining in the trust fund after the widow's life estate. In the event the trustees expend the corpus of the trust for the widow's benefit, the remaindermen would receive no property and of course no inheritance taxes against each share could be paid from such shares. Likewise, no funds being paid into the residuary estate, the taxes could not be paid from that fund even though directed by the Will.

While it is not usual to tax the life estate, yet because of all the circumstances noted above and in view of the fact that the widow has been given unusual powers and privileges in the enjoyment of the income of the trust, and that sufficient funds of the corpus of the trust are now available from which the state inheritance taxes may be paid, and that if such taxes are to be postponed to a future date to collect same from contingent remaindermen or from the residuary estate, it is doubtful if the taxes are ever paid, it is our thought that the full amount of the trust assets should be taxed to the widow. That under the provisions of Section 597, supra, for the taxing of the transfers of contingent remainders it is within the meaning of that section to tax life estates along with other classes of transfers referred to. That in such an instance the taxing of the widow's life estate would be at the lowest possible rate provided by statute upon the happening of the condition or contingency, and would be payable forthwith by the trustees. Postponement of the taxes until some future date when the taxes may be assessed and paid out of some contingent interest, or from some particular fund is not required by the statute, and it is our thought the taxes should be paid from the widow's interest in the trust at once.

In referring to legal authority to sustain our position that the life tenant should be required to pay state inheritance taxes rather than remaindermen or others having a contingent future interest, we desire to call attention to some New York cases we believe to be in point. New York statutes with reference to the taxing of the transfer of contingent interests are similar to those of Missouri, except that the rate provided by New York statutes shall be at the highest possible rate upon the happening of the condition or contingency, whereas under present Missouri statutes the rate shall be at the lowest possible rate upon the happening of the condition or contingency.

In referring to the following cases our thought has been to call attention to taxing of the life estate only, since references made to the rate of taxation in the opinions do not apply, nor were not intended to be applied to the present case.

In the case of *In the Matter of Zborowski*, 213 N.Y., 1.c. 116, the court said:

"The different statutes hereinbefore referred to contain evidence of a constant effort of the legislature to enlarge the class of transfers immediately taxable upon the death of the transferror. The question of the legislature's power in that regard was set at rest by the decision of this court in Matter of Vanderbilt (supra). In one aspect it may be unjust to the life tenant to tax at once the transfer, both of the life estate and of the remainder though contingent, and it may seem unwise for the state to collect taxes which it may have to refund with interest, but those considerations are solely for the legislature, who are to judge whether they are more than offset by the greater certainty which the state thus has of receiving the tax ultimately its due under the statute. However unwise or unjust it may seem in a particular case like this for the state to collect the tax at the highest rate when in all probability the remainder will vest in a class taxable at the lowest rate, it is the duty of this court to give effect to the statute as it is written."

Also in the case: In the Matter of Vanderbilt, 172 N.Y. in construing Section 230 of the Transfer Tax Law as effecting the payment of the tax upon contingent remainders and holding the tax was payable forthwith out of property transferred, the court said at l.c. 72:

"It seems to me clear that the legislature by this amendment intended to change the law upon the subject and to make the transfer tax, upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for, by the provisions of the statute, it is to be paid 'out of the property transferred.' So that whoever may ultimately take the property takes that which remains after the payment of the tax. This amendment makes provision for property transferred in trust. It, therefore, contemplates defeasible transfers as well as absolute transfers."

CONCLUSION

It is the opinion of this department that state inheritance taxes relating to the full amount of the assets of a trust in which a widow has been given a life estate by the Will of her husband should be assessed against and paid out of the interest of the widow.

Such taxes should not be assessed against, nor paid out of the interest of contingent remainder-men, nor from the residuary estate even though provided so by the Will. The widow has been given extraordinary powers in the naming of contingent remainder-men to take over any corpus remaining in the trust after her life estate and trustees have also been given unusual discretionary powers by the Will to encroach upon the corpus of the trust to any extent for the benefit of the widow. Such circumstances may either intentionally or unintentionally on the part of the trustees and widow result in no funds remaining in the trust after the widow's life estate to be passed on to the contingent remainder-men if named, or to the residuary legatees if the widow fails to name such remainder-men. In either event it would be impossible for the portion of the inheritance tax charged against the interest of each remainder-man to be paid out of his interest and it would also be impossible for any taxes to be paid from the residuary estate, and that no taxes would ever be paid to the state in either instance. Since the widow is the only person who may under any of the circumstances mentioned, benefit from either the income or corpus of the trust, and since the trustees are now the only persons who now have or may ever have sufficient trust funds of the estate in their possession from which the taxes can be paid, and also have sufficient legal authority to pay said taxes, it seems equitable to us that the inheritance taxes for the entire trust assets should be paid from the widow's interest, even though that interest is a life estate. That it is our further opinion that the taxing of the widow's life estate is proper and is within the meaning of Section 597, Mo. R.S.A. 1939, as amended, Laws of 1943, p. 307, providing for the taxing of the transfers of contingent remainders and that under said statutory provisions, it is unnecessary for the state of Missouri to await a future date until the inheritance tax may be assessed and paid out of the interest of contingent remainder-men if and when such interests may be ascertained, or to be paid from the residuary estate of testator if and when such estate should ever come into existence.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:

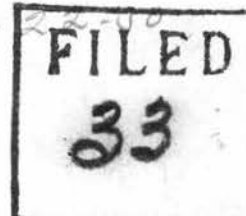
J. E. TAYLOR
Attorney General

COUNTY COURT:
COUNTY TREASURER:
SERVICES:

The county court in a third class county is not authorized to pay extra compensation to the county treasurer for duties performed pursuant to the disbursement of county road funds under the King Road Bill (Laws of Mo. 1945, p. 1471.)

November 22, 1950.

Honorable James Glenn,
Prosecuting Attorney
Macon County,
Macon, Missouri.



Dear Mr. Glenn:

This will acknowledge receipt of your recent request for an opinion from this office. Your request is stated as follows:

"The Macon County Court desires your opinion on the following question:

"Is the County Court authorized to pay from county funds to the duly elected County Treasurer extra compensation for duties performed by the County Treasurer under the so-called 'King Road Bill', Laws of 1945, page 1471, as reenacted by the Laws of 1947, Vol. 2, page 350?

"The County Court has found it to be a fact that by reason of the passage of the King Road Bill that the duties of our County Treasurer have been substantially increased due to the large amount of construction under this program. The Court has expressed itself as being willing to pay compensation for these extra duties if they are authorized to do so by law.

"Your advice as to the legality of this proposed extra compensation will be appreciated."

In regard to the above we would first call your attention to the well established rule of law that before a public officer can claim compensation for public services he must first point out the specific statute authorizing the payment of such compensation.

A restatement of this principle was made in the case of Nodaway County v. Kidder, 129 S.W. (2d) 857, 1.c. 860, where it is held:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute.

If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee District, 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackman, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

Many other cases could be cited in support of this principle but we feel it unnecessary to do so.

From the above, therefore, we adduce that in order that the duly elected County Treasurer be allowed extra compensation for duties performed under the Laws of Missouri, 1945, p. 1471, as amended by Laws of Missouri 1947, Vol. 2, page 350 (commonly known as the King Road Bill) that the county official must point out a statute which clearly provides that he is entitled to such additional compensation.

A thorough search of Missouri law fails to reveal a statute providing for such extra compensation. Your attention is directed to Laws of Missouri, 1945, p. 1540, Sec. 1 (R.S. Mo. A., Sec. 13800.3) fixing the salary of treasurer in counties of the third class. Said section reads as follows:

"The county treasurers in counties of the third class of this State, except counties under township organization, shall receive for their services annually, to be paid out of the county treasury in equal monthly installments at the end of each month by a warrant drawn by the county court upon the county treasury, the following sums: In counties having less than 7,500 inhabitants, the sum of \$1,300; in counties having more than 7,500 inhabitants and less than 10,000 the sum of \$1,400; in counties having more

than 10,000 inhabitants and not more than 12,500, the sum of \$1,500; in counties having more than 12,500 inhabitants and not more than 15,000 the sum of \$1,800; in counties having more than 15,000 inhabitants and not more than 20,000, the sum of \$2,200; in counties having more than 20,000 inhabitants and not more than 25,000 the sum of \$2,400; in counties having more than 25,000 inhabitants and not more than 30,000, the sum of \$2,400; in counties having more than 30,000 inhabitants but not more than 35,000, the sum of \$2,750; in counties having more than 35,000 inhabitants but not more than 40,000, the sum of \$3,200; and in counties having more than 40,000 inhabitants, the sum of \$3,500; provided, salaries set out and prescribed in this section shall be in lieu of any other or additional salaries, fees, commissions or emoluments of whatsoever kind for county treasurers in all counties of this state to which this section, by its terms, applies, the provisions of any other statute of this state to the contrary notwithstanding: Provided however that this increase in compensation shall not apply during their present terms of office."

From the above we believe it is clear that a county court is not authorized to pay any extra compensation to the county treasurer for duties performed pursuant to the King Road Bill (Laws of Missouri 1945, p. 1471 as amended) in disbursement of the county road funds.


CONCLUSION.

The county court in a third class county is not authorized to pay extra compensation to the county treasurer for duties performed pursuant to the King Road Bill (Laws of Missouri 1945, p. 1471 as amended) in disbursement of the county road funds.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney-General

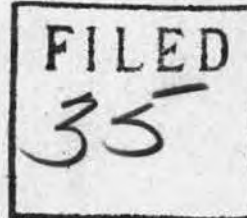
JEM/ld

ARMORIES:
ADJUTANT GENERAL:

Purchase of armory for which money was appropriated to Adjutant General to be made by State Purchasing Agent.

February 18, 1950

2/21/50



Mr. R. L. Groves
Fiscal Officer
Adjutant General's Office
Jefferson City, Missouri

Dear Mr. Groves:

This will acknowledge receipt of your recent opinion request which reads as follows:

"This office has been appropriated out of the State Treasury, chargeable to Postwar Reserve Fund, the sum of Seventy-Five Thousand Dollars (\$75,000.00) for the use of the Adjutant General for the purpose of purchasing lot and buildings, and for the remodeling and equipping of buildings to be used as an armory for the National Guard troops at 1701-1703 East Eighteenth Street, Kansas City, Missouri. Please refer to House Bill No. 436, Section 9.570.

"It is respectfully requested that this office be advised as to the proper procedure to consummate this purchase."

Section 9.570 of House Bill 436, recently passed by the 65th General Assembly, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the Postwar Reserve Fund, the sum of Seventy-five Thousand Dollars (\$75,000.00) for the use of the Adjutant General for the purpose of purchasing lot and buildings and for the remodeling and equipping of buildings to be used as an armory for National Guard Troops at 1701-1703 East Eighteenth Street, Kansas City, Missouri, legally described as:

Mr. R. L. Groves
Adjutant General's Office

"All of Lot Twenty-five (25), Block Three (3), William Tom's Addition, an addition in Kansas City, Jackson County, Missouri, including the building thereon"

for the period beginning July 1, 1949 and ending June 30, 1951."

The first question to be determined is whether or not the Adjutant General has the authority to purchase real estate to be used as an armory. There is no statute which specifically gives the Adjutant General, or any other officer or department, the authority to purchase or lease an armory.

Section 46 of Article III, Constitution of Missouri 1945, provides:

"The general assembly shall provide for the organization, equipment, regulations and functions of an adequate militia * * *."

Section 15063, R. S. Mo. 1939, provides:

"All armories owned by this state or by any organization of the national guard * * * shall be exempt from taxation for all purposes during the period of such ownership."

Section 15064, R. S. Mo. 1939, provides:

"* * * the officer in charge of any armory owned or leased by the state may permit the use of such armory for the meeting of such veteran societies without charge on dates when the same is not in use for military purposes."

Section 15067, R. S. Mo. 1939, provides:

"Every organization of the national guard of Missouri shall be provided by the state with such arms, uniforms and equipments, camp and garrison equipage as may be necessary for the proper training and instruction of the force and for the proper performance of duty required by this chapter."

Mr. R. L. Groves
Adjutant General's Office

The above statutes recognize that the armories may be owned or leased by the state. The case of State ex rel. v. Fleming, 275 Mo. 509, 204 S.W. 1085, recognizes the right of the state to lease an armory. From the foregoing, we are of the opinion that there is an implied authorization for the purchase under discussion. However, the appropriation in question is given to the Adjutant General. Is he a proper party to whom this appropriation may be given?

Section 15016, R. S. Mo. 1939, provides that there shall be an Adjutant General of the state and also provides that:

"The adjutant-general shall, if required by the governor, be the custodian of all property purchased for, allotted or issued to the military forces of this state and keep a correct account of the same."

As a matter of fact, the Adjutant General has been and is at present acting and recognized as such custodian of property purchased for, allotted or issued to the state military forces.

Section 15017, R. S. Mo. 1939, provides:

"There shall be a military council, to consist of the commanding general of the national guard, the adjutant-general of the state, the commanding officers of regiments of the national guard, the commanding officers of the organized regiments of the reserve military forces of the state, and the commanding officer of special troops. The commanding general shall be the president of the council, which council, except as herein otherwise provided, shall sustain the same relation to the military forces of the state and the governor as the general staff of the army sustains to the United States army and the president. The military council shall formulate plans for the organization, instruction, equipment and maintenance of the military forces of the state, provide for encampment and all other field and armory instruction and make allotments of funds and supplies appropriated or furnished for the support, equipment and maintenance of the military forces of the state. All appropriations made for military

Mr. R. L. Groves
Adjutant General's Office

purposes shall be appropriated and expended by the council. Vouchers and accounts covering the expenditure of funds and appropriations for the support of such forces shall be audited and paid only when fully itemized, certified and approved by the president of the council."

Section 15037, R. S. Mo. 1939, provides:

"There shall be a commanding general of the national guard with the rank of brigadier-general who shall command the same and who shall be responsible only to the governor for its drill, equipment, instruction, inspection, service, movements, operations and general efficiency. His office shall be the office of administration and his headquarters the headquarters of the national guard."

The present Adjutant General is also acting in the capacity of Commanding General of the National Guard as has been the practice in recent years. This practice has been held valid in an official opinion of this Department, addressed to the Honorable Forrest Smith, State Auditor, under date of February 23, 1938.

Therefore, the statutes recognize that there may be state owned armories. The Adjutant General is the custodian of all property purchased for the military posts. He also serves as Commanding General of the National Guard and as president of the military council. In these capacities he is charged with the administration of the National Guard and must certify and approve the expenditure of funds and appropriations for the support of the military forces. In view of this, we are of the opinion that there is implied authority to purchase real estate to be used as an armory, and also that the Adjutant General is a proper party to whom the use of funds may be appropriated by the legislature to make such purchase.

Section 64 of an Act passed by the 63rd General Assembly, Laws of Missouri 1945, page 1450, provides that:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power

Mr. R. L. Groves
Adjutant General's Office

to acquire lands from the constitution of the state."

In the case of White v. Jones, 177 S.W. (2d) 603, 352 Mo. 354, the state purchasing agent, in his official capacity, was sued for breach of a lease agreement executed by his predecessor in office. The court, at l.c. 605, stated:

"Section 14590, R. S. 1939, Mo. R. S. A., Sec. 14590, provides that the state purchasing agent 'shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state.' We think it apparent that, in executing the lease, the state purchasing agent acts not only as a state officer, but for and on behalf of the state department or agency for whom the lease is made. In this case, in executing the lease, he acted with and on behalf of the Board of managers of the State Eleemosynary Institutions. It is further apparent from Chapter 105, supra, that the state purchasing agent has no funds out of which such lease rentals may be paid, but that all rentals are to be paid from the appropriations of the departments for whom the leases are executed.
* * *"

Therefore, since the Adjutant General has no constitutional power to acquire lands, Section 64, supra, is applicable. He will be required to requisition the State Purchasing Agent to make this purchase. In so doing, the State Purchasing Agent will be acting for and in behalf of the Adjutant General, the funds to be provided out of the appropriation made to the Adjutant General for this purchase.

CONCLUSION

It is therefore the opinion of this department that the State Purchasing Agent is the proper party to purchase the lot and buildings for which money was appropriated by the 65th General Assembly

Mr. R. L. Groves
Adjutant General's Office

in House Bill 436, Section 9.570, for the use of the Adjutant
General for the purpose of purchasing said lot and buildings.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



RHV:hr

STATE BOARD OF CHIROPRACTIC EXAMINERS:

State Board of Chiropractic
Examiners not authorized to
pay investigator from the
operating fund of said
Board.

February 24, 1950



Honorable Vernon H. Grogan, D.C.
Treasurer
State Board of Chiropractic Examiners
413a Court Street
Fulton, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"Is it within the jurisdiction of the State Board of Chiropractic Examiners to secure a private investigator or detective to obtain information necessary to revoke the license of a chiropractor for illegal practices; and, pay said investigator or detective from the operating fund of said board?"

Section 10058, R.S. Mo. 1939, states:

"It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of any-one to whom a license to practice chiropractic in this state has been issued. Upon complaint being made to the board it shall investigate and if it deems probable cause exists for the complaint, shall furnish a copy of the complaint to the accused by registered mail, together with a notice of the time and place for the hearing of same, which shall not be less than thirty days after the depositing of said communication in the United States mail. The accused shall have an opportunity to be heard to answer such charges in person, or by

Honorable Vernon H. Grogan, D.C.

attorney, and if upon such hearing it shall be proven beyond a reasonable doubt to the board, that the accused is guilty of such immoral or illegal action, or is addicted, or has been addicted, during a period of the past six months to the use of narcotics, drugs, or intoxicating liquors, or in any way guilty of deception or fraud in the practice of chiropractic, or of shielding anyone in immoral practices, criminal or illegal actions, or is guilty of any criminal or illegal actions, the board shall revoke his license."

(Underscoring ours.)

The above section makes it the duty of the State Board of Chiropractic Examiners to investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this State has been issued. The question here is whether the State Board of Chiropractic Examiners, in pursuing its duty set forth above, may hire a private investigator to obtain information leading up to the filing of charges against the chiropractor suspected of illegal and immoral practices, and pay the said investigator out of the appropriation made by the Legislature to the Board.

It seems appropriate here to point out that Section 10054, R.S. Mo. 1939, requires that certain fees are to be paid to the Board by all applications for a license to practice chiropractic in this State, and that Section 10057, R.S. Mo. 1939, requires a payment of fees to the Board for renewal of such license from time to time. Section 10055, R.S. Mo. 1939, states:

"All fees shall be paid in advance to the treasurer of the board, and be turned in to the state treasury, the first of each and every month, to the credit of a fund which is hereby appropriated to the use of said board of chiropractic examiners. The compensation and expenses of the members and officers of said board shall be paid out of such fund, upon the warrant of the auditor of the state issued upon a requisition and signed by the president and secretary of said board, and under the seal of said board. On December 31st of each year, all of the balance of said fund in excess of \$5,000.00 shall be paid to the state school fund in like manner."

Honorable Vernon H. Grogan, D.C.

Out of this fund the Legislature appropriates for each bien-nial period a sum of money to defray the operating expenses of the Board. The most recent appropriation was made by the 65th General Assembly by House Bill No. 28, for the period from July 1, 1949 to June 30, 1951. Section 7.190 of this Bill reads:

"There is hereby appropriated out of the State Treasury, chargeable to the State Board of Chiropractic Examiners Fund, the sum of Fourteen Thousand Two Hundred Dollars (\$14,200.00) for the use of the State Board of Chiropractic Examiners for the payment of salaries, wages and per diem of the officers, members and employees; for the original purchase of property; for the repair and replacement of property; and for the operating and other expenses, for the biennial period beginning July 1, 1949 and ending June 30, 1951, as follows:

"Personal Service:

"The salaries, wages and per diem of the Board members, secretary and stenographer. \$8,000.00

"Additions:

"Original purchase of educational equipments, (books, magazines, book cases) office furniture and equipment, and other miscellaneous equipment . 100.00

"Repairs and replacements:

"Operative equipment, consisting of laboratory, scientific and testing equipment, office furniture and equipment, transportation and conveying equipment, other and miscellaneous equipment 100.00

"Operation:

"General expense, including communication, printing, binding, travel within and without the state, insurance and premiums on bonds, rent and other general expenses; and materials and supplies, consisting of stationery and office supplies. 6,000.00

"Total out of State Board of Chiropractic Examiners Fund . . \$14,200.00"

Honorable Vernon H. Grogan, D.C.

We have now to answer the question whether, out of any one of the above items, the Board would be justified in paying out money to an investigator.

We would here call your attention to Article IV, Section 23 of the Constitution of Missouri, 1945, which states:

"Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

(Underscoring ours.)

In view of this explicit constitutional provision above quoted, to the effect that the amount and purpose of any appropriation must be distinctly specified, we believe that it follows that the language and terms used in an Appropriation Act, descriptive of the purpose of the appropriation, must be given a specific rather than a general construction. In other words, it is to be presumed that the Legislature intended the descriptive words or terms used to amount to a designated specification of the purpose for which the money is appropriated, because the Constitution requires that the purpose be distinctly specified.

Your inquiry involves the question as to whether or not the words or terms, descriptive of the purpose for which the money in the Appropriation Act under consideration is appropriated, are broad enough in their meaning to warrant the payment therefrom of an investigator such as you contemplate hiring.

This necessitates a review of the Appropriation Bill under which the Board of Chiropractic Examiners will operate until June 30, 1951, and which is quoted above.

The first item of that Appropriation Bill is entitled "Personal Service," has an appropriation of Eight Thousand Dollars (\$8,000.00), and is for "The salaries, wages and per diem of the Board members, secretary and stenographer." Clearly, the salary of an investigator could not be paid from this item.

The second and third items, each with an appropriation of only One Hundred Dollars (\$100.00), are for equipment only.

The final item, of Six Thousand Dollars (\$6,000.00), is marked "Operation", and reads:

Honorable Vernon H. Grogan, D.C.

"General expenses, including communication, printing, binding, travel within and without the state, insurance and premiums on bonds, rent and other general expenses; and materials and supplies, consisting of stationery and office supplies."

We do not believe that there is anything in this item which would authorize the contemplated expenditure for an investigator.

CONCLUSION

It is the conclusion of this department that the State Board of Chiropractic Examiners is not authorized to hire a private investigator, to be paid from the operating fund of said Board, to obtain information necessary to the revocation of the license of a chiropractor suspected of illegal or immoral practices.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

LOCATION AND ESTABLISHMENT
OF ROADS:

The county court is the proper forum for the commencement of a proceeding for the location and establishment of a county public road.

May 5, 1950

5/6/50

Honorable Friend B. Greene
Prosecuting Attorney
Shannon County
Eminence, Missouri



Dear Sir:

We have your recent letter in which you request an opinion of this department, which request reads as follows:

"The proper form in which to file petition for the location and establishment of County Public Roads."

Section 8473, R.S.A. Mo. 1939, is, in part, as follows:

"Applications for the establishment of all public roads, shall be made by petition to the county court. * * *"

We are of the opinion that the above quoted portion of said section is conclusive on the question presented by you and clearly shows that the county court is the proper forum in which to file a petition for the location and establishment of county public roads.

This statute was so construed by the Supreme Court of Missouri in the recent case of Lane v. Pankey, 221 S.W.2d. 195. In that case a petition had been filed in the county court for the establishment of a county road and the county court was about to assume jurisdiction of a condemnation proceeding for the purpose of acquiring some right-of-way required for said road. The issue in the case was whether or not the establishment of a road involved performance of a judicial rather than of an administrative function, and it was contended that in view of the fact that under Article VI, Section 5 of the 1945 Constitution, the enumerated powers of the county court are purely administrative and are not judicial, the county court could neither establish a road nor exercise jurisdiction in a condemnation proceeding for the acquisition of right-of-way therefor.

Hon. Friend B. Greene

The Supreme Court held in substance that the mere establishment of a county road is an administrative function of which the county court has jurisdiction but that the determination of the amount which constitutes just compensation for a right-of-way needed for the road is a judicial question as to which the county court lacks jurisdiction. The following is a pertinent quotation from the opinion of the court in the above cited case:

"* * *A county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof. But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads."

It is clear from the above quoted language of the Supreme Court that the above quoted portion of the statute is held by the Supreme Court to be in full force and effect since the adoption of the 1945 Constitution.

CONCLUSION

We are accordingly of the opinion that the county court is the proper forum in which to file a petition for the location and establishment of county public roads.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

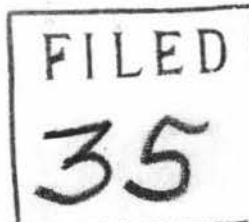
SAMUEL M. WATSON
Assistant Attorney General

SMW:mw

TAXATION:
LOCAL ASSESSMENTS:

Property of state not subject to local assessment
by city of third class for paving of street.

August 24, 1950



Mr. R. L. Groves
Fiscal Officer
Adjutant General's Office
Jefferson City, Missouri

Dear Mr. Groves:

This will acknowledge receipt of your recent request for an opinion of this department, which request reads as follows:

"This office has been presented with an assessment bill for the paving of street adjoining a state-owned armory.

"It is requested this office be advised whether, under existing laws, municipalities may levy benefit assessments on state property for street improvements.

"In the event the reply is in the affirmative can funds appropriated under House Bill No. 25, Section 4.026-Personal Services; Additions; Repairs and Replacements, or Operations be utilized for payment?"

It has been ascertained that the Adjutant General's Office has been presented with an assessment bill by the City of Kennett, Missouri, for the paving of a street adjoining the state-owned armory within the city. The City of Kennett is a city of the third class. The question then is whether or not an assessment bill levied by a third class city against property owned by the state for the paving of a street adjoining such property is a valid assessment.

The constitutional and statutory exemption of public property from the burden of taxation apply only to general taxation and cannot be relied upon in the case of special assessments for public improvements. A distinction is made between taxes for local assessments and taxes levied for general public purposes. We find

Mr. R. L. Groves

the following stated by the court in the case of Normandy Consol. School District v. Wellston Sewer District, (Mo. App.) 77 S.W. (2d) 477, at l.c. 478:

"It has been consistently held that neither the Constitution (article 10, Sec. 6, Const. Mo.) nor the statute (section 9743, R.S. 1929 (Mo. St. Ann. Sec. 9743, p. 7863)), both of which provide for the exemption of certain kinds of property, including public property, from taxation, purport to refer to or include an exemption from special assessments for local improvements, and that it is therefore within the legislative power and will, in the passage of legislation providing for the making of local, public improvements, to require public property benefited by the improvement to pay its proportionate share of the expense thereof. City of Clinton v. Henry County, 115 Mo. 557, 22 S.W. 494, 495, 37 Am. St. Rep. 415; Thogmartin v. Nevada School Dist., 189 Mo. App. 10, 176 S.W. 473."

In City of Clinton v. Henry County, 115 Mo. 557, 22 S.W. 494, the court held at l.c. 565:

"The question whether public property, such as courthouse property, should share in paying for street improvements is one open to the legislative will. We must therefore look to the statute relating to cities of the third class to see what the legislature has declared upon this subject. We repeat that the constitution, and general law relating to exemption from taxation, have no bearing upon the issue of law in this case. The question is one of delegated power, and not of exemption from taxation."

Therefore, we must look to the statutes which authorize cities of the third class to levy assessments for the paving of streets and determine whether or not authority has been given such cities to assess state property for such local improvements. Section 6987, R.S.Mo. 1939, authorizes cities of the third class to grade, pave and improve streets and alleys, and provides that the cost of such shall be charged against the lots and tracts of land fronting or abutting on such streets and alleys.

Section 6987 further provides that:

Mr. R. L. Groves

"* * *All lands owned by any county or other political or municipal subdivisions, cemeteries and railroad rights of way, fronting or abutting on any of said improvements shall be liable for their proportionate part of the cost of such improvement, and tax bills shall be issued against such property as against other property, and any county, city or other political or municipal subdivision that shall own any such property shall out of the general revenue funds or other funds pay any such tax bill, and in any case where any county, city or other political or municipal subdivision, cemetery company or owners or railroad company, shall fail to pay any such tax bill, the owner or holder of same may sue such county, city or other political or municipal subdivision, cemetery company or owners or railroad company on such tax bill, and be entitled to recover a general judgment against such county, city or other political or municipal subdivision, cemetery company or owners or railroad company.
* * *

We now must determine whether or not the wording of Section 6987, supra, "all lands owned by any county or other political or municipal subdivision," include property owned by the state.

In Normandy Consol. School District v. Wellston Sewer District, supra, the court further held at l.c.478:

"But even though the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit, yet the rule is that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the law-makers have manifested a clear legislative intent that such public property shall be subject to the assessment. This doctrine traces its ancestry back to the ancient common-law principle that the crown was not to be bound by any statute, the words of which restrained or diminished any of his rights or interests, unless he was specially named therein; and the theory of the modernized restatement of the

Mr. R. L. Groves

principle is that to require public funds to be paid out for taxes would necessarily divert such funds from the true public use which they are otherwise designed to serve. And of course, if a clear expression of legislative intent is to be required as the basis for the enforcement of special tax bills against public property strictly devoted to public use, then mere general language in a statute will not suffice to warrant such assessment, and public property will not be held included within the scope of any such statute unless by express enactment or clear implication. City of Clinton v. Henry County, supra; City of Edina, etc., v. School Dist., etc., supra; City of St. Louis v. Brown, 155 Mo. 545, 56 S.W. 298; State ex rel. v. School Dist. of Kansas City, supra; Thogmartin v. Nevada School Dist., supra."

We fail to see where state property is by express enactment or clear implication included in "all lands owned by any county or other political or municipal subdivision" which Section 6987 provides shall be subject to local assessments. The state is no "municipal subdivision," nor is it included as an "other political subdivision." The state, in the enactment of its statutes, acts in its sovereign capacity as a political entity and while acting as such cannot be considered a political subdivision in its legislation.

Article X of the Constitution of 1945 is the article providing for taxation. Section 1 of this Article distinguishes between the taxing power exercised by the General Assembly for state purposes and by counties and other political subdivisions for local purposes. Section 6 treats of the property of "the state, counties and other political subdivisions." Section 15, in defining "other political subdivision," does not include the state within its definition.

Section 5 of an Act of the 63rd General Assembly found in Laws Missouri 1945, page 1800, exempts from taxation for state, county or local purposes, "First, lands and other property belonging to the state; Second, lands and other property belonging to any city, county or other political subdivision in this state."

In view of the above, it is our opinion that the legislature.

Mr. R. L. Groves

has failed either by express enactment or clear implication to include property owned by the state among that public property made liable for local assessment by Section 6987.

The necessity of answering the second question presented in your request disappears by reason of the answer to your principal inquiry.

CONCLUSION

It is therefore the opinion of this department that cities of the third class have no authority to levy assessment bills for the paving of streets against lots or tracts of land owned by the state.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

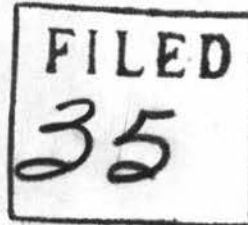
J. E. TAYLOR
Attorney General

ADJUTANT GENERAL) Since third class city has no authority to levy
APPROPRIATIONS) assessment against state-owned armory for paving
MUNICIPALITIES) a street, Adjutant General cannot pay or contri-
bute a proportionate part of the cost of same.

October 23, 1950

10/26/50

Mr. R. L. Groves
Fiscal Officer
Adjutant General's Office
Jefferson City, Missouri



Dear Sir:

This is in reply to your recent request for an official opinion of this department which reads in part as follows:

"Reference is made to your opinion rendered to this office dated 24 August 1950, relative to tax assessment for paving of street adjoining armory at Kennett, in reply to our letter dated 4 August 1950.

* * * * *

"The question that is not decided is whether you (the Adjutant General), from your (his) appropriation for repairs and replacements under Secs. 4.026 and 9.570a of the appropriation acts of the 65th General Assembly, can pave one-half of the street abutting a state armory or contribute a proportionate part to the paving of a street which serves as an ingress and egress to a state armory."

This department has held in an official opinion addressed to you under date of August 24, 1950, that the assessment bill presented to the Adjutant General's Office for the paving of a street adjoining the state-owned armory in the City of Kennett, Missouri, was invalid, as cities of the third class have not been given the authority to levy assessment bills for the paving of streets against lots or tracts of land owned by the state. The question now presented is whether or not the Adjutant General, from his general appropriations for repairs or replacements, can voluntarily contribute or pay a proportionate part of the cost of said paving.

It is fundamental that appropriations may be expended only as authorized by law. No constitutional or statutory

Mr. R. L. Groves

provision can be found which authorizes the Adjutant General to contribute a proportionate part of the cost of paving a street adjoining a state-owned armory, and such payment would constitute a contribution as cities of the third class are without authority to assess state-owned property for paving a street adjoining same.

The general appropriations for repairs and replacements can be utilized only for the payment of authorized repairs and replacements, and such appropriations cannot be considered authority to expend same for an invalid assessment. There is no authority elsewhere authorizing such expenditure, and the appropriation statutes themselves cannot furnish such authority. An attempt to furnish such authority therein would be an attempt to include general legislation in an appropriation bill, which would be unconstitutional and void. It was so held in the case of *State ex rel. v. Canada*, 113 S.W. (2d) 783, 342 Mo. 121, at l.c. 790:

" * * * Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. *State ex rel. Davis v. Smith*, 335 Mo. 1069, 75 S.W. 2d 828; *State ex rel. Hueller v. Thompson*, 316 Mo. 272, 289 S.W. 338. * * * "

One might consider that, as a matter of fairness, this bill should be paid. However, this is a matter for the Legislature, as the court has pointed out in the case of *City of Clinton v. Henry County*, 115 Mo. 557, 22 S.W. 494, at l.c. 571:

" * * * The property here in question is strictly public property, and on well settled principles of law cannot be held liable for these local improvement assessments until the legislature so says in clear terms or by necessary implication, and that it has not done by the statute relating to cities of the third class.

Mr. R. L. Groves

"There is much merit in the argument that the public, the beneficial owner of the courthouse property, ought, as a matter of fairness, to bear a part of the cost of improving the streets, but the argument addresses itself to the legislature. Courts must declare the law as they find it."


CONCLUSION

It is, therefore, the opinion of this department that since cities of the third class are without authority to levy assessment bills for the paving of streets against lots or tracts of land owned by the state, the Adjutant General may not, from his general appropriations for repairs and replacements, pay or contribute a proportionate share of the cost of paving a street adjoining a state-owned armory within such a city.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RHV:VLM

PROBATE COURTS:

A probate court of a fourth class county has no jurisdiction and authority over the case and cannot commit an indigent nervous person who is not insane to a state hospital for treatment.

January 16, 1950

4-25-V-0

Hon. W. L. Halbrook,
Judge of Probate and Magistrate Courts,
Dent County,
Salem, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads as follows:

"I would appreciate an opinion on the following question: Has the Probate Court of a fourth class county the authority to admit a nervous person to a State Hospital for treatment as a County patient? If so what would be the procedure to commit such person?"

Receipt is also acknowledged of your letter of December 27, 1949, in which the statement is made that you wish to make it clear that the opinion request was for an interpretation of the meaning of Sections 1 and 2, page 913, Laws of 1945, with reference to whether it is the duty of the probate court or of the county court to commit nervous persons who are not insane to the state hospitals for treatment.

Said Sections 1 and 2, Laws of 1945, read as follows:

Section 1. "The state hospitals at St. Joseph, Fulton, Farmington and Nevada are hereby authorized to give treatments, or injections of serum to citizens of this state who may be suffering from nervous or mental diseases, but who do not need hospitalization."

Section 2. "All persons appearing for such treatments at the above mentioned hospitals, financially able to, shall pay a fee not to exceed the sum of five dollars for each treatment, or injection of serum, but if such person needing such treatment is an indigent resident of this state, upon the

Hon. W. L. Halbrook

producing by said indigent person of a certificate of the county court, or proper authority of the City of St. Louis, said treatments and serums shall be given free of charge to such person."

In attempting to answer your inquiry it is necessary that we determine what the intention of the legislature was in the enactment of the statute. In the case of *State vs. Schult*, 143 SW (2d) 1.c. 489, the court laid down a very good rule for the interpretation of statutes and the intention the legislature must have had in their enactment, the court said:

"The rule is well settled in this state, in accordance with a long line of decisions, that the legislative intent must be determined from the statute as a whole, and all of its provisions harmonized if reasonably possible. * * * An act of the legislature cannot be nullified for uncertainty if it is susceptible of any reasonable interpretation; * * *"

Applying this rule to the interpretation of the provisions of Sections 1 and 2, supra, we find that it is the intention of the legislature, particularly in Section 1, to provide a means for treatment of certain nervous citizens of the state. Such treatments are for those persons suffering from nervous disorders who are not insane and who do not need to be confined in the state hospitals. However they do need to have treatment and injections of serums for their nervous conditions, and since the state hospitals were well staffed with physicians who were specialists on all kinds of nervous diseases and the state hospitals were well equipped for patients of this type, it seems that the legislature quite logically provided that such nervous citizens should receive the treatments and injections of serums at the state hospitals mentioned in Section 1.

Applying the rule of interpretation noted above further, Section 2 indicates that the legislature intended that those who were eligible to receive the treatments mentioned in Section 1 were to receive them voluntarily and that it was not the intention of the legislature by legal authority to require any person to take such treatment against his will. Said section specifically provides in part, "All persons appearing for such treatments at the above mentioned hospitals, * * *"

Hon. W. L. Halbrook

No reference is made in the act to the probate court having jurisdiction of a matter in which it is alleged that a named resident of the county is nervous, but not insane, is in need of treatment but not hospitalization at one of the state hospitals and that upon a proper hearing the court may commit such person to one of said hospitals for treatment.

In the case of *In re Moore's Guardianship*, 148 S.W. (2d) 116, the St. Louis Court of Appeals held that a probate court is a "court of limited jurisdiction," and possesses no greater powers than those conferred upon it by statute, and that the court can exercise its jurisdiction in the manner provided by statute.

The only statute we have been able to find that authorizes the probate court to commit any person to a state hospital at the expense of the county is Section 9328, page 907, Laws of 1945, which provides in part as follows:

"The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto. * * *"

Section 9335 of the same Act also provides:

"For the admission of insane poor persons the following proceedings shall be had: * * *"

This section sets forth the procedure in detail that must be followed in those cases where it is sought to have insane persons admitted to the state hospitals.

It has been previously noted that Sections 1 and 2 of the 1945 Laws make no provisions for the commitment of a nervous person who is not insane to a state hospital and that no procedure for such commitment is provided by said sections. We are also unable to find any other statutes authorizing such a procedure and since the jurisdiction of the probate court may only extend to those matters provided by statute and in the absence of such statutes we conclude that the probate court has no jurisdiction over this class of cases and has no legal authority to commit such a nervous person to a state hospital.

Your last letter makes inquiry as to whether or not it is the duty of the probate court or of the county court, under the provisions of Sections 1 and 2, Laws of 1945, supra, to commit nervous persons who are not insane to a state hospital for treatment.

Hon. W. L. Halbrook

We have previously stated that it is not the duty of the probate court to commit such persons and we shall now consider whether or not this class of cases properly comes within the jurisdiction of the county court and under what circumstances, if any, it becomes the duty of the county court to commit such persons to the state hospitals.

Since the adoption of the Missouri Constitution of 1945 the general jurisdiction of a county court has become more limited than formerly. In the cases of *Bradford vs. Phelps County*, 210 SW (2d) 996 and *ex rel Kowats vs. Arnold*, 356 Mo. 661, it was held that county courts are no longer courts in a juridical sense but are ministerial bodies managing the county's business.

In the handling of the county's business, it has always been the duty of the county court to provide for the indigent persons residing within the territorial limits of the county. The duties of the county court in this respect have not been changed by the provisions of the new constitution, newly enacted statutes, or recent court decisions. Sections 9590 to 9607 Mo. R.S.A. 1939, inclusive, provide what the duties of the county court are with reference to the provision and maintenance of such poor persons.

We are unable to find any section of the statutes dealing with the duties of the county court with reference to the provision and maintenance of the poor persons of the county or of any other statutes that make it the duty of the county court to hear and determine cases of the class mentioned in your letter and under proper circumstances to commit such indigent nervous persons who are not insane to a state hospital for treatment. In the absence of such statutory authority the county court lacks the power to do this and our answer to your last inquiry is that it is not the duty of the county court and that the county court has no authority to commit a nervous person who is not insane and who does not need hospitalization to a state hospital where he may be given the proper medical treatment for his nervous condition.

It is our further opinion that while the county court has no jurisdiction of the matters noted above, it does have jurisdiction to conduct hearings in order to determine whether nervous persons seeking treatment, or injections of serums for their nervous conditions are indigent residents of the state. The jurisdiction of the court in conducting the hearings is limited to the determination of those facts only. If the court finds that a nervous person seeking admission to a state hospital is in fact an indigent resident of the state it shall issue a certificate evidencing such finding to such indigent nervous person. Upon the presentation of said certificate to those in charge of the

Hon. W. L. Halbrook

state hospital to which such nervous person may appear, he shall be given the treatments or the injections of serums mentioned in Sections 1 and 2, supra, without charge to himself.

CONCLUSION


It is therefore the opinion of this department that neither a probate court or a county court has any jurisdiction over a matter wherein it is alleged that a nervous person who is not insane is in need of treatment or injections of serums at a state hospital and in which it is sought to have the court to commit such person to such hospital. That no procedure is provided and neither of said courts have authority to commit a nervous person to a state hospital for treatment under the provisions of Sections 1 and 2, page 913, Laws of 1945. That said sections authorize and the county court has jurisdiction and may determine whether a nervous person who is not insane and is not in need of hospitalization but is requesting treatment for his condition at a state hospital is an indigent resident of the state. Upon a finding that such person is an indigent resident of the state, the court shall issue its certificate of such findings to such nervous person. That upon a presentation of such certificate at one of the state hospitals mentioned in Section 1 to which such nervous indigent person may appear, he shall be given treatments or injections for his nervous condition without charge to himself.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney General

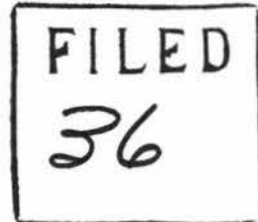


PNC:rm

PROBATE JUDGE:

A probate judge may not collect fees for hearing and determining inheritance tax matters. Probate judges no longer have the power to solemnize marriages.

June 9, 1950



Mr. Sam Hackney
Probate Judge of Barton County
Lamar, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion. You thus state your request:

"I wish an opinion on the following matter involving two sections of the statutes in which there seems to be a conflict:

"'Section 13404 as last amended Laws 1947, volume 2, page 356, provides that in counties having 30,000 inhabitants or less the probate judge or clerk shall, at the end of each month, file with the director of revenue a written report verified by affidavit, showing all fees collected during such month and the same shall be paid over to the director of revenue to be deposited by him with the state treasurer in the "magistrate fund".

"'Section 13404A as amended Laws 1943, page 868, provides that all probate judges in counties of less than 19,000 inhabitants shall, at the end of each month, make and file with the county clerk a report of all fees actually collected by him or his clerk during the month except fees earned and collected for the solemnization of marriages and the hearing and determining of inheritance tax matters, together with a report of all such fees earned during the month but not yet collected, and he shall, at the end of each month, pay over to the county treasurer all monies

Mr. Sam Hackney

collected by him or his clerk, taking duplicate receipts therefor.'

"The conflict between these two sections is apparent. Section 13404A seems to say that the probate judge may withhold fees for solemnizing marriages and fees for hearing and determining inheritance tax matters, which would be the 2 1/2% of tax assessed. Section 13404 makes no exception but requires that all fees be reported to and paid over to the director of revenue.

"Now I wish to know which one of these two Sections applies to me. (Barton County has less than 19,000 population.) As there is an apparent conflict between 13404 as last amended in 1947 and 13404A as last amended in 1943, I wish to know whether I may withhold fees for hearing and determining inheritance tax matters and for solemnizing marriages, or whether these fees should all be paid over to the Director of Revenue."

Section 13404a, referred to by you above, was repealed by Senate Bill No. 1143, of the 65th General Assembly. Section 13404, referred to by you above, states in regard to fees for inheritance tax matters:

"For supervising all estate in each court and having appraised such of said estates as may be liable for taxes under the state inheritance tax law, in addition to the fees applicable as hereinbefore provided, a fee of two and one-half cent of all such inheritance taxes finally assessed and paid on property assessed through the respective courts shall be charged, the same to be collected by said judges from the person whose duty it is to pay such tax: Provided, in all estates in which the state treasurer (director of revenue) or the executor, administrator or trustee in charge thereof, shall be required under the provisions of the inheritance tax law to refund to the person entitled thereto any inheritance tax collected by them, the state or county receiving same shall refund to the person entitled thereto out of the two and one-half per cent fee on such tax the proportional part thereof to which any

Mr. Sam Hackeny

such person may be entitled to a refund.

* * *

"In counties now or hereafter having 30,000 inhabitants or less, the judge or clerk of the court shall, at the end of each month, file with the director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid during such month and at the same time pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund,' all money collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. * * *"

From the above quoted portion of Section 13404, Laws Missouri 1947, it is clear that a probate judge may not retain fees earned and collected by him for determining inheritance tax matters.

In regard to retaining fees for solemnizing marriages we direct your attention to Laws of Missouri 1945, page 1145, (now Section 3363, Mo.R.S.A. Pocket Part, 1939) which states:

"Marriages may be solemnized by any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate courts."

Since a probate judge has, since 1945, been unable to perform a marriage ceremony, the question of fees does not arise.

CONCLUSION

It is the opinion of this department that a probate judge may not collect fees for hearing and determining inheritance tax matters. Probate judges no longer have the power to solemnize marriages.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General

EXPERT WITNESSES: A prosecuting attorney in a third class county operating under the county budget law may include in his estimated budget of expenditures an item for the payment to proposed expert witnesses for work necessary to be done by them before testifying on behalf of the state in criminal cases.

January 20, 1950



Honorable Lane Harlan
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion on the following matter:

"Does the prosecuting attorney of a third class county (operating under the County Budget Law) have the authority to place in his budget an estimate of fees for possible expert witnesses which he may need in the prosecution of criminal cases?"

On January 24, 1949, this department rendered an opinion holding that:

"A state witness, testifying as an expert witness, can only claim the ordinary witness fee, and cannot refuse to give testimony because he has not previously been tendered a fee as an expert witness."

The cases cited in this opinion (a copy of which is enclosed) hold that an expert witness can only receive the ordinary witness fee for testifying, even though his testimony is in part or in whole in that field in which he is an expert. However, it will be observed that these cases also hold that such an expert witness cannot be required to do any work in his field prior to testifying in order to better qualify him to testify, unless he is tendered compensation in addition to the regular witness fee for so doing. This is also the holding of the court in the case of Barnes v. Boatmen's National Bank of St. Louis, Missouri, 156 S.W.(2d) 597. The law upon this point may be considered to be well settled.

The next question, therefore, which we must answer is, whether a county of the third class, operating under the County Budget Law, may spend county funds to pay a proposed witness for doing work prior to testifying in order to prepare himself to testify as an expert state witness?

Mon. Lane Harlan

Upon this question we have not been able to find, and do not believe that there are, any Missouri cases directly in point. We must, therefore, look to the general grant of power given to county courts under the County Budget Law, and try to determine whether it is sufficiently broad to enable the court to make such an expenditure.

Section 10914, Mo. R.S.A. 1939, states:

"The court shall show the estimated expenditures for the year by classes as follows:

"Class 1. Care of paupers declared by lawful authority to be insane (in state hospitals).

"Class 2. Expense of conducting circuit court and elections, not to include the salary of any officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 2 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years.

"Class 3. Repair, upkeep and construction of roads and bridges on other than state highways and not in any special road district. List roads and bridges to be constructed.

"Class 4. Pay or salaries of officers and office expense. List each office separately and the deputy hire separately.

"(County clerk shall prepare estimate for the county court but his failure does not excuse the court.

"Class 5. Contingent and emergency expense.-- The county court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the court proposes the funds in this class shall be used, shall be shown.

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"Class 6. Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest: Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

It will be observed that in Class 4 above the statement is made that:

"Pay or salaries of officers and office expense. List each office separately and the deputy hire separately."

It seems to us that under this class the county court would be authorized to make such an expenditure as is contemplated in the instant case.

Also we would call your attention to Section 10917, Mo. R.S.A. 1939, which section reads, in part:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an

Hon. Lane Harlan

opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. * * *

This section, we believe, gives the county court considerable powers of discretion in making expenditures of county funds. The section has been construed in the case of *Bradford v. Phelps County*, 210 S.W.(2d) 996. In that case the prosecuting attorney of Phelps County, a third class county operating under the county budget law, submitted to the county court in his estimated budget of expenditures for the year 1946, the item of \$900.00 for stenographic services. This item the court reduced to \$600.00. The prosecuting attorney appealed from this order to the circuit court, which found in his favor. The county appealed to the Missouri Supreme Court which reversed the holding of the circuit court and held that it was within the jurisdiction of the county court to reduce the \$900.00 item to \$600.00. In that portion of the opinion in which it discussed the discretionary powers of the county court the Supreme Court said: (l.c. 999 and 910)

"* * *It is evident from the language of the County Budget Law that county courts in complying with the Law have duties of a discretionary nature in examining, revising and changing the estimates of the county's expenditures to the end of promoting the standard of 'efficiency and economy in county government,' Section 10917, supra. In giving such discretionary managerial powers and duties to the county courts, the Legislature has not provided an appeal whereby a circuit court may review the county court's acts in the exercise of its discretion and whereby the circuit court can substitute its own independent judgment. See again and compare State ex rel. Dietrich v. Tausch, supra.

"No statute makes provision for a salary for the stenographer of the plaintiff, prosecuting attorney of Phelps County, as did a statute determine the amount of the salary of the plaintiff county judge in the case of *Hill v. Buchanan County*, 346 Mo. 599, 142 S.W.(2d) 665; consequently the county court, acting under the County Budget Law, in changing Prosecuting Attorney's estimate was not voiding a

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mandatory obligation imposed by the Legislature, the same authority which imposed the budget requirements. In our case the county court was acting in the exercise of a discretionary power purposing efficient and economic county government somewhat like the county court was exercising a delegated legislative and discretionary power to allow such compensation "as may be deemed just and reasonable" for the services of the county treasurer according to the language of statute considered in the case of *State ex rel. Dietrich v. Daues*, supra, and the statute involved in *State ex rel. Dwyer v. Nolte*, 351 Mo. 271, 172 S.W. 2d 354. As was the county court in the *Daues* case exercising discretion in reducing the compensation to the county treasurer to an amount which it deemed 'just and reasonable' (the standard stated in the statute involved in that case) so was the county court in the case at bar, in examining, revising and changing the estimates as required by the County Budget Law, exercising discretionary action in the public interest and with the purpose of promoting 'efficiency and economy in county government.'

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see Laws of Missouri, 1945, pp. 574, 578, and 583, Mo. R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be avail-

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able for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. To put it in another and surer way--since prosecuting attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."

In view of the above, therefore, it is our opinion that a county court may expend county funds for the purpose contemplated in the instant case, i.e. the payment of money to a proposed expert witness for the purpose of preparing himself to testify on behalf of the state in a criminal case.

Our next and final question is whether a prosecuting attorney may include such an item in his estimated budget of expenditures. In this respect we call your attention to a portion of the opinion from the Bradford case, cited above:

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see Laws of Missouri, 1945, pp. 574, 573, and 583, Mo. R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government.

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To put it in another and summary way-- since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."(Emphasis ours)

Under the above we believe that a prosecuting attorney may include in his budget of estimated expenditure an item for the payment of a proposed expert witness for work done or to be done in order to prepare himself to testify on behalf of the state in a criminal case. Certainly one of the most important functions of a county government is enforcement of the law. The county government stands between the law-abiding citizens of its county and those persons who would commit outrages and depredations upon them. When a crime is committed it is the duty of the county, operating through the proper county officials, to promptly and energetically seek out and prosecute with the utmost efficiency the perpetrator of the crime. It is a matter of common knowledge that in many cases effective prosecution of such criminals depends, wholly or in large part, upon the testimony of expert witnesses, and it is equally well known that such witnesses generally must, if their testimony is to be of any value, do some work on the case prior to testifying. If the county is forbidden to use county funds to pay for such preliminary work many such criminals would be acquitted who would otherwise be convicted, and who, in the interest of the general welfare, should be convicted. We do not believe that Missouri law contemplates that the hands of the county should be so tied, and that it should in this way be rendered defenseless against the enemies of its citizens.

We do believe, however, that such an item in the budget of the prosecuting attorney, as is here contemplated, should not be designated "fees for expert witnesses" as you seem to intend doing, for the reasons discussed in the first part of this opinion, but rather that the item should be designated "fund for criminal investigation."

CONCLUSION

It is the opinion of this department that a prosecuting attorney in a third class county operating under the county budget law may include in his estimated budget of expenditures an item

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for the payment to proposed expert witnesses for work necessary to be done by them before testifying on behalf of the state in criminal cases.

Respectfully submitted,

HUGH F. THOMPSON
Assistant Attorney General

PROVED:

J. P. TAYLOR
Attorney General

HFT:mw

MOTOR VEHICLE : The type of hitch or length thereof does
TRAILERS. : not determine whether a vehicle should be
registered and licensed as a trailer.

February 20, 1950.

Filed 37



Honorable David E. Harrison,
Superintendent,
Missouri State Highway Patrol,
Jefferson City, Missouri.

Dear Mr. Harrison:

Reference is made to your letter of recent date requesting an opinion from this department on the following question:

"Farm operators sometimes use their farm tractors for pulling trailers loaded with farm produce upon the highways of this state. The trailers are of various descriptions - some of them with two and some with four wheels. The hitches used for attaching the trailers to the tractors are of various designs and length. Does the type and length of hitch have any bearing with regard to whether the trailer should be licensed?"

In L. 1945, p. 1194 (repealing and reenacting Sec. 8367 R.S. Mo. 1939) the term "trailer" is defined as follows:

"Any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by a self-propelled vehicle, except those running exclusively on track, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle."

The law further requires that tractors designed for agricultural use when used upon the highways of the state, other than in traveling from one field or farm to another, or to or from places of delivery or repair, must be registered and licensed the same as any other motor vehicle; and that trailers drawn by tractors which are designed for agricultural use must be registered and licensed whenever used upon the highways of the state, except when traveling from one field or farm to another, or to or from places of delivery or repair. Whenever a tractor designed primarily for farm use loses its exemption and is required to be registered and licensed, then the

trailer which is using such a tractor as motive power also must be registered and licensed.

As a matter of law, neither the type of hitch nor the length thereof would determine whether the trailer should be licensed. A farm wagon with proper attachments to be pulled with a team of horses would be included within the definition of a trailer when pulled by a self-propelled vehicle. The length of the hitch would not be material in determining whether a vehicle is a trailer when such trailer is drawn by a self-propelled vehicle. Since the legislature has defined a trailer "an any vehicle without motive power designed * * for being drawn by a self-propelled vehicle* * *", then a vehicle so used is required to be registered and display a license plate.

Included within the definition of a "trailer" is a "vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle."

This definition is broad enough to include a two wheel vehicle used as a trailer, although a part of the weight is carried by the tractor. The type or length of hitch would not be material in determining whether such a vehicle is a trailer when drawn by a self-propelled vehicle.

CONCLUSION.

Neither the type of hitch nor length thereof used to connect a vehicle used as a trailer to a self-propelled vehicle would determine whether such a trailer should be licensed.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General.

JEM/LD

FOOD AND DRUG: Natural fruit juices are not included in the defini-
SOFT DRINKS: tion of soft drinks and are not subject to the
Beverage Inspection Act.

March 11, 1950

Dr. Buford G. Hamilton
Director, Division of Health
Jefferson City, Missouri



Dear Sir:

I.

We received the following request for an official opinion from this department:

"We would like to have an official opinion from your department on the following question under Section 1 of the Beverage Inspection Act of the State of Missouri. The term 'soft drinks' as used in this Act are defined as follows:

'Soft drinks shall be held to mean and include all beverages of every kind manufactured and sold in this State, which shall be understood to include those containing less than one-half of one per cent of or no alcohol, including carbonated beverages, still drinks, seltzer water, artificial or natural mineral waters and all other waters used and sold for beverage purposes.'

"We would like to know if Welch's Grape Juice concentrated, orange juice, lemon juice, grape fruit juice, pineapple juice, apricot juice, and apple juice are included under the definition of soft drinks.

"It is our understanding that all of these juices are normally diluted with water before they are consumed. Some of these juices such as Welch's Grape Juice are sold in bottles while others such as orange juice and lemon juice and some others are sold in cans."

Dr. Buford G. Hamilton

II.

Section 9980.1, R.S.A., Laws Mo. 1943, page 585, defines the term soft drinks as follows:

"* * *The term 'soft drinks' as used in this Act shall be held to mean and include all beverages of every kind manufactured or sold in this state, which shall be understood to include those containing less than one-half of one per cent of or no alcohol, including carbonated beverages, still drinks, seltzer water, artificial or natural mineral waters and all other waters used and sold for beverage purposes.* * *"

Prior to the enactment of this definition by the Legislature in 1943, the term "soft drinks" was defined by Section 9957, R. S. Mo. 1939, as follows:

"* * *which shall be understood to include those containing less than one-half of one per cent of or no alcohol, including ginger ale, ginger beer, hop ale, soda water, bevo, unfermented grape juice, cider, carbonated beverages, coco-cola, unfermented cereal or malt beverages, all non-intoxicating beverages and flavored beverages, seltzer water, mineral waters and all other waters used and sold for beverage purposes, and also all fountain syrups, flavors and extracts intended for use in the preparation and concoction of so-called 'soft drinks.'" (Underscoring ours.)

It should be noted that unfermented grape juice and cider were removed from the list of beverages which would be constituted to be soft drinks according to the Legislature when the Laws of 1943 were enacted. This would seem to indicate an intention on the part of the Legislature to omit natural fruit juices from being classed and defined as a soft drink.

The Supreme Court of Missouri in the case of Coca-Cola Bottling Co. v. Mosby, 233 S.W. 446, 289 Mo. 462, considered the constitutionality and purpose of Section 9957, supra, and the entire soft drink inspection act. The court said that the Act prescribes specifically the products to be inspected; it prohibits the manufacture and sale of such products as not pure and wholesome; it requires samples of such products to be

Dr. Buford Hamilton

submitted for inspection by manufacturers and requires sellers of products not manufactured in this state to file affidavits of the manufacturer with the inspector that he may determine the purity of the products; and requires the inspection of such products; it prescribes the fees for inspections, and directs the work of the inspector. The court held that the Act is an inspection measure and not a revenue measure. The court found that the Act was constitutional and a proper exercise of the statutory authority.

The present Beverage Inspection Act by Section 9980.7, R.S.A. 1939, Laws 1943, page 585, Sec. 7, provides for an affidavit to be filed with the State Board of Health, now the Division of Health, by the manufacturer or bottler or other reputable person having actual knowledge of the composition of such beverages, syrups, or flavors stating that no material which is not pure, clean or wholesome was used in the manufacture of same.

Section 9980.8 R.S.A. 1939, Section 8 of Laws 1943, page 585, requires persons engaged in the manufacture or bottling, within this state, of any non-intoxicating beverage or soft drink as defined by the Act, not to use any substance materially or chemically in the manufactured bottling or preparation of such beverages which is not pure, clean and wholesome. The Act continues to be an inspection measure.

A reference to the definition of the word "juice" is necessary for an understanding of the statute defining soft drinks.

The word "juice" is defined as follows:

"* * * The extractable fluid contents of plant cells or plant structures consisting of water holding sugar or other substances in solution.' Webster's Dictionary. 'The fluid part of animal or vegetable matter; especially the expressible watery matter in fruits, containing usually the characteristic flavor.' Standard Dictionary."

"'Juice' as used in law excepting manufacturer of nonintoxicating cider and fruit juice from penalties for manufacture of liquor is sap obtained by expression." Words and Phrases, Vol. 23, page 346.

Judge Otis in the case of United States v. Burnett, 53 Fed. (2d) 219, 1.c. 233 defines cider as the expressed juice of apples. He said in this case:

Dr. Buford Hamilton

"1. The word 'fruit,' whatever else it may include, certainly includes grapes, and the words 'fruit juices' certainly include the juice of grapes or grape juice. Cider and grape juice certainly are the products of manufacture. They are manufactured by expressing from apples and grapes, respectively, their juices. There is no other conceivable way in which either cider or grape juice can be manufactured."

The United States Circuit Court of Appeals in the case of U.S. v. Phez Co., 28 Fed. Rep.(2d) 106, affirmed the same case reported in 25 Fed. Rep.(2d) 1011, and said:

"* * *The evidence was that Loju was made by adding water and sugar to loganberry juice, the water being two parts to one of the juice, and that Phez consisted only of sweetened loganberry juice, to be diluted by the addition of water to make it fit for use as a beverage. * * *it is conceded that Phez is not included in the term 'other soft drinks,' and that the judgment for the recovery of the tax paid thereon was properly rendered by the court below. Phez, which is unfermented loganberry juice with sugar added, is admittedly not a soft drink, or taxable within the meaning of the act, for the reason that before it becomes acceptable as a beverage water must be added thereto; but it is contended that Loju is a soft drink, and taxable as such, for the reason that before it is placed upon the market water and sugar are added. To assert, however, that it is potable as a soft drink, is not to answer the question whether in the Revenue Act it was included among the beverages subjected to taxation as embraced in the words 'other soft drinks.' The act dealt with two distinct kinds of beverages: First, a fruit juice, namely, unfermented grape juice, derived by extracting by mechanical means the juice of the grape; and, second, certain named artificial soft drinks mixed, compounded, or manufactured from various ingredients, at the close of which enumeration, in order to prevent the exclusion of possible other soft drinks of the same nature and similarly manufactured, the law-makers added the words 'and other soft drinks.'

Dr. Buford Hamilton

"Loju is not thus manufactured of divers ingredients; it is nothing but unfermented loganberry juice, diluted with water and sweetened, and it is not of the nature of the soft drinks which are specified. The case is one for the application of the rule of ejusdem generis, in accordance with which such terms as 'other,' 'other things,' 'others,' or 'any other,' when preceded by a specific enumeration, are commonly given a restricted meaning and limited to articles of the same nature as those previously described,' 25 R.C.L. 997, United States v. Stever, 222 U.S. 167, 174, 32 S. Ct. 51, 56 L. Ed. 145, United States v. Nixon, 235 U.S. 231, 35 S. Ct. 49, 59 L. Ed. 207. That sweet cider which is sold in bottles as a beverage and is obviously a soft drink, is not included in the term 'other soft drinks,' is held in the leading case of Monroe Cider Vinegar & Fruit Co. v. Riordan (C.C.A.) 280 F. 624, a decision which was followed in Sterling Cider Co. v. Casey (D.C.) 285 F. 885, and Casey v. Sterling Cider Co. (C.C.A.) 294 F. 426. In the Monroe Cider Case it was said: 'As is well known, there are hundreds, perhaps thousands, of manufactured soft drinks with tradenames which are made up of various components, and it was naturally impossible for Congress to attempt to enumerate this large collection of soft drinks, and no doubt Congress intended, under the act under consideration, to tax all kinds of soft drinks in which, among other things, carbonated or artificial waters, or extracts, or sirups, or other ingredients of one kind or another, were used. It is plain, however, that it never was the legislative intent to include sweet cider, for there can be no other explanation of specific mention of unfermented grape juice, on the one hand, or of ginger ale, sarsaparilla, etc., on the other.' The reasoning which led to that conclusion as to sweet cider applies with equal force to Loju." (Underscoring ours.)

If natural fruit juices are construed to be included within the definition of soft drinks as a still drink then fresh orange juice prepared in restaurants would be subject to the control of the Division of Health and the inspection tax.

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In the case of Horn & Hardart Co. v. U.S., 14 Fed. Supp. 509, the United States government collected a tax of .02¢ per gallon on orange juice expressed from the fruit by the plaintiff in its restaurants in New York City. In the year 1932, plaintiff sold and served to its customers at its various restaurants 50,340 gallons of orange juice on which they paid a tax of \$1,006.81. The government collected the tax from them on the ground that the orange juice was a still drink and subject to the tax imposed by Section 615(a)(4) and the Revenue Act of 1932. The plaintiff filed suit in the court of claims to recover the tax paid. The evidence proved that the orange juice was served to the plaintiff's customers without the addition of water, sugar, or any other element and without change from its natural state. The tax was collected under the provisions of Section 615(a) of the Revenue Act of 1932, which reads: (l.c. 511 and 512)

"There is hereby imposed---

"(1) Upon all beverages derived wholly or in part from cereals or substitutes therefor, containing less than one-half of 1 per centum of alcohol by volume, sold by the manufacturer, producer, or importer, a tax of 1½ cents per gallon.

"(2) Upon unfermented grape juice, in natural or concentrated form (whether or not sugar has been added), containing 35 per centum or less of sugars by weight, sold by the manufacturer, producer, or importer, a tax of 5 cents per gallon.

"(3) Upon all unfermented fruit juices (except grape juice), in natural or slightly concentrated form, or such fruit juices to which sugar has been added (as distinguished from finished or fountain syrups), intended for consumption as beverages with the addition of water or water and sugar, and upon all imitations of any such fruit juices, and upon all carbonated beverages, commonly known as soft drinks (except those described in paragraph (1), manufactured, compounded, or mixed by the use of concentrate, essence, or extract, instead of a finished or fountain syrup, sold by the manufacturer, producer, or importer a tax of 2 cents per gallon.

"(4) Upon all still drinks (except grape

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juice), containing less than one-half of 1 per centum of alcohol by volume, intended for consumption as beverages in the form in which sold (except natural or artificial mineral and table waters and imitations thereof, and pure apple cider,) sold by the manufacturer, producer, or importer, a tax of 2 cents per gallon.'

"It is not contended that the orange juice produced and sold by plaintiff was taxable under section 615(a)(3), which covers unfermented fruit juices in natural form 'intended for consumption as beverages with the addition of water or water and sugar.' The sole question presented, therefore, is whether it was subject to the tax imposed on still drinks by section 615(a)(4).

"* * * One of the oldest rules of statutory construction is that, where there is, in the same statute, a particular enactment, and also, a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. United States v. Chase, 135 U.S. 255, 10 S. Ct. 756, 34 L. Ed. 117. The construction of the applicable statutes falls squarely within this rule. Section 615(a)(3) is a particular enactment dealing with the tax on fruit juices, while section 615(a)(4) is a general enactment dealing with the tax on still drinks. Even if unfermented fruit juices in their natural state might otherwise fall into the classification of still drinks, they are not taxable under subsection (a)(4) for the reason that they are specifically dealt with in subsection (a)(3) and are exempt from the tax there imposed.

"We think that if Congress had intended to tax

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unfermented fruit juices intended for consumption as beverages in their natural state, it would have declared that intention directly, as could easily have been done by making all fruit juices, without exception, subject to the tax. Congress, however, did not do this, but imposed a tax only on such unfermented fruit juice as was intended for consumption as a beverage with the addition of water or water and sugar, indicating clearly the intent that fruit juices intended for consumption in their natural state be tax free. Expressio unius est exclusio alterius.

"(4) The orange juice prepared by plaintiff and served in its natural form, without the addition of water or water and sugar, to customers as a part of a meal, was not subject to a tax of 2 cents per gallon under section 615 of the Revenue Act of 1932. The plaintiff is therefore entitled to recover the amount of the tax paid, and a judgment in its favor for \$1,006.81 with interest is awarded."

If we should attempt to hold that fruit juices are subject to the Beverage Inspection Act as a beverage then we should consider the definition of a beverage. A beverage is a liquid for drinking; usually a drink artificially prepared and of an agreeable flavor. U.S. v. Robason, Kansas D.C. 138 Fed. Supp. 991, 992.

Under the rule of ejusdem generis making unlawful use of branded or marked and other beverage containers by persons other than owners, held not to include milk bottles and cans, especially in view of usual definitions of "beverage" as drink artificially prepared. Climax Dairy Co. v. Mulder, 242 P. 666, 669, 78 Colo. 407.

"It is a recognized rule of interpretation that ---

"In cases of doubt or uncertainty, acts in pari materia either before or after, and whether repealed or still in force may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions.
* * * * Vane v. Newcombe, 132 U.S.

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220, 235, 10 Sup. Ct. 60, 33 L. Ed. 310;
Stout v. Board of Commissioners, 107 Ind.
343, 348, 8 N.E. 222; Tiger v. Western
Investment Co. 221 U.S. 286, 306, 31 Sup.
Ct. 578, 55 L. Ed. 738."

The United States Court of Appeals in the case of Casey v. Sterling Cider Co., 294 Fed. Rep. 426, again held that sweet cider was not taxable as a soft drink under the Revenue Act that taxed other soft drinks. This court said that it would amount to writing into the statute the term sweet cider which was not there. That agreed with the finding of the court in the Monroe Cider Vinegar & Fruit Co. case. This court also said that "unfermented grape juice as such and in its natural state is not drunk as sweet cider is in its natural state. Unfermented grape juice is commonly drunk when water or water and sugar are added and when so used is a compounded or mixed drink. When so used it undoubtedly becomes a soft drink." (Underscoring ours.)

The United States Revenue Act, 1921, taxing soft drinks is somewhat similar to our Beverage Inspection Act but it included unfermented grape juice as being a taxable beverage. Our former definition of soft drinks also included unfermented grape juice and cider. Since the Legislature omitted unfermented grape juice and cider from the new definition of the term soft drinks we conclude that it was their intention to exclude all natural fruit juices from the application of the Beverage Inspection Act, to include all artificial manufactured drinks of the same general nature as defined in Section 1 of the Act.

CONCLUSION

We are, therefore, of the opinion that it is clear that the Legislature, in enacting the Beverage Inspection Act, Laws 1943, did not intend to classify Welch Grape Juice concentrated; unfermented grape juice, orange juice, lemon juice, grapefruit juice, pineapple juice, apricot juice, and apple juice or cider as a soft drink, provided that the same is the juice extracted from the natural fruit and that it is in its natural state, but beverages that are manufactured or created by the use of parts of natural fruit juices and the use of artificial flavoring and water would be included in the term soft drinks.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

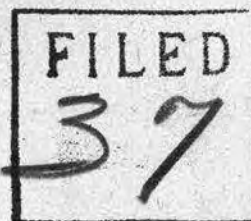
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VITAL STATISTICS:
BIRTH REGISTRATION:

A child generated by the first husband of the mother should be registered as the child of said natural father even though the mother divorces said husband and marries husband No. 2 before the birth of said child.

April 11, 1950

Honorable Buford G. Hamilton, M.D.
Director, Division of Health
Jefferson City, Missouri



Dear Sir:

I.

This department is in receipt of your recent request for an official opinion upon the following problems:

"We are now holding birth certificates covering two identical cases involving disputed paternity. In both cases, the mother was married to one man, divorced him, and married another during the normal period of gestation. In one case, the mother desires the child to carry her former husband's name and have her former husband listed as father; in the other, the mother desires the child to carry her present husband's surname and have her former husband listed as father.

"For administrative purposes, in cases of disputed paternity, we prefer that the name of the child be omitted and all data relative to the alleged father omitted. We desire this procedure on the assumption that it is easier to complete an incomplete document than it is to rebuild a document that is claimed to be erroneous.

"In cases where the husband of the mother at the time of conception differs from the husband of the mother at the time of the delivery, it appears to us that the child is actually illegitimate and that the present husband should formally adopt the child, his marriage to the mother prior to delivery notwithstanding.

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"We shall appreciate your opinion on how to register a birth where the husband of the mother at the time of conception differs from the husband of the mother at the time of delivery."

The Supreme Court of Missouri recently said in the case of *Bernheimer v. First National Bank of Kansas City*, 225 S.W.(2d) 745, that:

"Missouri has two legitimizing statutes, Secs. 315 and 316, R.S. Mo. 1939, Mo. R.S.A., both of which have been in force for over a century. Sec. 315 has been construed to mean that if a man have by a woman a child born out of wedlock, yet if he afterward enter into a legal marriage with her and recognize the child as his own, the child will thenceforward be legitimized, and this is true even though the child was conceived in iniquity. *Stripe* case below. This statute can have no application here under the holding of the trial court, because the court ruled plaintiff's parents had never been legally married since the father had never been legally divorced from his preceding wife Sally.

"(6,7) As to Sec. 316, while the section says the issue of all marriages 'decreed' null in law shall be legitimate, it has been consistently held that the statute does not literally mean the marriage must have been declared void by court decree, but only that the marriage was in fact void and could and would have been so decreed. And the same decisions further hold that if such marriage was entered into in good faith, even by one of the contracting parties and not both, the child will be deemed legitimate."

Section 316, R. S. Mo. 1939, provides as follows:

"The issue of all marriages decreed null in law, or dissolved by divorce, shall be legitimate."

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Section 1514, R.S. Mo. 1939, provides, in part, as follows:

"* * *but no such divorces shall affect the legitimacy of the children of such marriage."

The St. Louis Court of Appeals in the case of Ash v. Modern Sand & Gravel Company, 234 Mo. App., 1195, 1.c. 1206, 122 S.W.2d. 45, 1.c. 51, said:

"* * *Every child born in wedlock is presumed to be legitimate. Public policy sanctions this view. (Bower v. Graham, 285 Mo. 151, 225 S.W. 347; Gates v. Seibert, 157 Mo. 254, 1.c. 272, 57 S.W. 1065, 80 Am. St. Rep. 625; Busby v. Self, 284 Mo. 206, 223 S.W. 729.)

"Such presumption in favor of the legitimacy of children born in wedlock is the strongest known to the law, and the courts in their righteous zeal to protect the innocent offspring will not permit this presumption to be overthrown unless there is no judicial escape from such a malign conclusion. * * *"

The child in both of the cases involved in your letter would be legitimate beyond a question of a doubt. Each child was conceived during wedlock and would not be illegitimate as suggested in your letter. Sections 316 and 1514, cited above make it plain that the legitimacy of any child born after a divorce of the parents is unaffected by the dissolution of their marriage.

We should consider the meaning of the terms father, step-father, and parent so that the problem of completing the birth certificate may be solved.

"Parent means one who has generated a child; a father or mother." Boudreant v. Texas & N.O.R. Co., 78 S.W.2d. 641, 643. Also cited in In re Tombo, 149 N.Y.S. 219, 221, 86 Misc. 361.

"The term 'parent' primarily means one who procreates, begets, or brings forth offspring as father or mother, and literally can only include father or mother related by blood, excluding adopting parents, and persons in loco parentis. McDonald v. Texas Employers' Ins. Ass'n, Tex., 267 S.W. 1074, 1075.

* * * * *

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"The ordinary meaning of 'parent' is one who begets or brings forth offspring, and by common acceptation the word is ordinarily used to designate a legitimate relationship but the trend of modern legislation and court decisions is towards a more liberal use of the term as regards mother of illegitimate child. Mother of illegitimate son is his 'parent' within statute providing compensation for death. Smith-Hurd Stats. c. 48 Sec. 144; c. 39, Sec. 2; c. 70, Sec. 2. Marshall v. Industrial Commission, 174 N.E. 534, 535, 342 Ill. 400.

"The legal and ordinary acceptation of the word 'parent' does not include a stepfather or stepmother, and, under the rule that criminal statutes must be strictly construed, it follows that prosecution does not lie against a stepfather, under Gen. Code, Sec. 12970, for failure to provide for his stepchildren. State v. Barger, 14 Ohio App. 127, 128."

* * * * *

"Accused who married mother of an illegitimate girl and who was not her putative father was not her 'parent', within the exception of the federal kidnapping statute, where girl had lived in accused's household for only about four months and thereafter lived with her grandfather until, with her mother's consent, she was married at the age of 15, and at time of alleged kidnapping she had been an emancipated married woman for about three years. Patterson Act, Sec. 1, 18 U.S.C.A. Sec. 408a; Pope's Ark. Dig. Sec. 6215. Miller v. United States, C.C.A. Ark. 123 F2d. 715, 717.

* * * * *

(Parent)"One who generates a child, a father or mother by blood. Hendy v. Industrial Accident Board, 146 P.(2d) 324, 325, 115 Mont. 516.
(Parenthesis ours)

"'Parent' in its common and accepted meaning refers to the natural father or mother. Welch v. Welch Aircraft Industries, 29 N.E. 2d, 323, 326, 108 Ind. App. 545.

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"A 'parent' is one who begets or brings forth offspring; a father or a mother. The word 'parent' standing alone means the parent who begat the child and not a parent artificially created by law. Gardner v. Hall, 26 A.2d 799, 805, 132 N.J. Eq. 64." (Words and Phrases, Vol. 31, p. 75, 78, 79, 80. Pocket Edition, p. 15, 16.)

"A 'stepfather' is a man who is the husband of one's mother, but not one's father. Larsen v. Harris Structural Steel Co., 243 N.Y.S. 654, 655, 230 App. Div. 280.

* * * * *

"Child of whose existence mother's husband was aware at time of marriage with child's mother held 'stepchild' of mother's husband, notwithstanding that child was illegitimate, and hence 'stepfather' was chargeable with support and maintenance of child on proof that child was or was likely to become public charge. Laws 1933, c. 482, Sec. 101, subd. 5; Public Welfare Law, Sec. 125; Domestic Relations Law, Sec. 120. 'Child' embraces legitimate and illegitimate issue, while 'step' is prefix used before father, mother, brother, sister, son, daughter, child, etc., to indicate that person thus spoken of was not blood relative, but is relative only by marriage of parent; 'stepfather' is a man who is husband of one's mother but is not one's father. Jones v. Jones, 292 N.Y.S. 221, 225, 161 Misc. 660." (Words and Phrases, Vol. 40, pages 144, 145)

* * * * *

"Stepfather is the husband of ones mother by a subsequent marriage; husband of ones mother who is not ones father." (Hendy v. Industrial Accident Board, 146 P.2d. 324, 115 Mont. 516.)

The wishes of the mother in regard to the statements on the birth certificate should not be the controlling factor with your office. You should have the natural parent or father listed on the birth certificate of each child as its father. Then if the mother desires to have the name of the child changed she may do


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so by an action in the circuit court for a change of name. If the stepfather of the child wishes to formally adopt the child, then a proceeding in the circuit court for the adoption of the child would be necessary. The law provides for a change of the birth certificates after an adoption has been approved by the circuit court. (See Section 9614a R.S.A. Laws of Mo. 1947, Vol.2, page 213.)

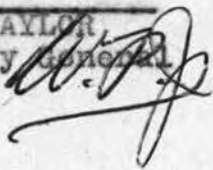
CONCLUSION

It is the conclusion of this department that a child conceived in wedlock by husband number one should be registered as the child of said husband even though the mother divorces him and marries husband number two before the birth of said child, and regardless of the wishes of the mother the surname of the child will be that of the natural father or husband number one.

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General 

SJM:mw

FOOD AND DRUGS:
SEIZURE OF FOOD:

Food seized by the Bureau of Food and Drugs cannot be held for more than three days without a court order.

May 8, 1950



Honorable Buford G. Hamilton
Director, Division of Health
Jefferson City, Missouri

Dear Sir:

I.

This will acknowledge receipt of your request for an official opinion upon the following problem:

"We would like to have your official opinion regarding the length of time which the food and drug commissioner may keep any food, drug, device, or cosmetic under embargo.

"You will note under Section 9861, under Food and Drug Laws, paragraph A, that the commissioner has the authority to embargo any food, drug, device, or cosmetic which he believes is adulterated or misbranded so as to be dangerous or fraudulent within the meaning of this Act. Under this paragraph, there is no mention of a time limit on the embargo.

"Under paragraph D, you will note that when embargoing any meat, seafood, poultry, vegetable, fruit, or other perishable articles which are unsound or contain any filthy, decomposed, or putrid substance, or that may be poisonous or deleterious to health or otherwise unfare, the commissioner shall forthwith condemn or destroy the same or render it unsalable as human food, if the person who owns the goods agrees to such action. If the owner refuses, then the commissioner may serve such a person with a written notice directing him to hold or store any such articles for a period of not longer

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Than three days from the date of service of such notice. It further states that the commissioner or his agent, after issuing such notices, shall apply to the judge of the court of common pleas or of the circuit court for an order to condemn or destroy same.

"In a good many cases, it is necessary to run extensive tests, both chemical and bacteriological, on such products to determine their wholesomeness, purity, and safety. It is impossible in three days time to run such tests. For these reasons, therefore, we would like to know if we are limited to a time limit of three days on embargoing such products or if we may hold such products under embargo until such chemical and bacteriological tests are completed."

We will confine this opinion to a consideration of the provisions of Section 9861(d) which section number will be 196.03, R. S. Mo. 1949, because Section 9861(a) and Section 9861(b) relate to detaining or embargoing any food, drug, device or cosmetic which is believed to be adulterated or so misbranded as to be dangerous or fraudulent, while Section 9861(d) relates to the seizure of any meat, seafood, poultry, vegetable, fruit or other perishable articles. If our consideration of the provisions of Section 9861(d) is not sufficient to answer your request then a subsequent request in regard to the provisions of subsections (a) and (b) of Section 9861 may be submitted to us.

Section 9861(d) Reenacted, Laws of 1943, page 559, provides as follows:

"Whenever the state board of health or any of its authorized agents shall find in any room, building, vehicle of transportation or other structure, any meat, seafood, poultry, vegetable, fruit or other perishable articles which are unsound, or contain any filthy, decomposed, or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, the state board of health, or its authorized agent, shall forthwith condemn or destroy the same or in any other manner render the same unsalable as human food if the person found in possession of same or claiming possession or ownership or same shall agree to

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such action; provided that if any such person refuse to permit such action by the state board of health or its agent, such agent may serve such person with a written notice directing him to hold or store any such articles for a period not longer than three days from the date of service of such notice. Such notice shall also prohibit any such person from selling or in any manner disposing of such articles of food during the prescribed period. The state board of health or its agent after issuing any such notice shall immediately apply to the judge of the court of common pleas or of the circuit court in whose jurisdiction such articles of food may be found or held for an order to condemn or destroy same. Upon the application for such order the judge of any such court shall, immediately hold a summary hearing and at the conclusion thereof shall order the articles of food in question released to the person claiming ownership or possession thereof. Upon the application for any such order, the judge of any such court may make such orders for the custody, storage, or temporary preservation of any of such articles of food as may under the circumstances be deemed proper. After the hearing prescribed for herein, if the judge of any such court find the complaint to be sustained, he may direct the articles of food to be disposed of as provided for by subsection(c) of this section." (Underscoring ours.)

Section 9862, Reenacted Laws 1943, page 559, provides as follows:

"It shall be the duty of the Prosecuting Attorney in any county or city in the state, when called upon by the State Board of Health, or any of its assistants, to render any legal assistance in its power to execute the laws and to prosecute cases rising under the provision of this article. Before any violation of this Act is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the State

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Board of Health of its designated agent, either orally or in writing, in person, or by attorney, with regard to such contemplated proceeding. The court at any time after seizure up to a reasonable time before trial, shall, by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruit or vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyses were obtained."

The provisions for seizure of food in accordance with provisions of said Section 9861(d) cannot be classed as entirely civil nor as entirely criminal in character. The seizure proceedings may be termed quasi-criminal and quasi-civil in nature. It was stated by the court in U.S. v. Eight Packages and Casks of Drugs, 5 Fed.2d. 971, 1.c. 976 and 977 as follows:

"The question in every case of seizure is whether the seizure was justified or not, and the proceeding to ascertain that fact is a civil proceeding, but a seizure of goods is, in effect, a proceeding against the owner * * * and hence criminal in nature. * * *"

You have the right to take samples of any food under suspicion and run the tests before the seizure is made. (See Sections 9875 and 9876, Reenacted Laws 1943, page 559.)

A fair interpretation of said Section 9861(d) means that after the food has been seized by your department that it cannot be held longer than three days from the date of seizure. The law contemplates that during the three day period that you will call upon the prosecuting attorney to file the condemnation suit in the proper court as provided by said section and to request the court for an order concerning the custody, storage or temporary preservation of any such articles of food until the condemnation proceeding is decided. Said section 9861(d) also provides for a summary hearing before the judge of said court upon the condemnation petition. But it would not always be possible for the judge of the court in which the condemnation petition or complaint was filed to hold a hearing upon the questions involved. He would have the power to issue a temporary restraining order for the storage of food while tests were being made of samples of the food seized by your department under the provisions of said Section 9861(d).

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Section 9859, Reenacted Laws 1943, page 559, also gives the circuit court the power to enjoin any person violating any provision of Section 9858, as reenacted by Laws 1943. Section 9858(h) prohibits the removal or disposal of a detained or embargoed article in violation of said Section 9861.

Section 9860, as reenacted, Laws 1943, page 559 provides criminal penalties for violation of any of the provisions of Section 9858 (Laws 1945, p. 559) which is not set forth in full in this opinion, but is part of the Food and Drug Act.

It is in the discretion of the authorities connected with the Bureau of Food and Drugs of the Division of Health to decide which one of the three different judicial proceedings, which have now been mentioned,--injunction proceedings, criminal prosecution or condemnation proceedings--they will pursue against an alleged violator. If they elect to seize the food described in said subsection (d) of Section 9861, then they must be prepared to file the condemnation suit before three days have elapsed.

III.

CONCLUSION

It is, therefore, the opinion of this department that any food seized by the Bureau of Food and Drugs of the Division of Health under the powers granted in Section 9861(d), Reenacted Laws, 1943, page 559, cannot be held for longer than three days without an order from the proper court so to do.

Respectfully submitted,

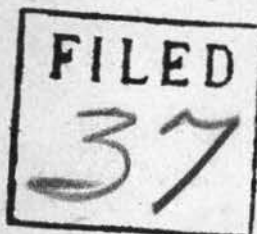
STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

May 17, 1950

Honorable Lane Harlan
Prosecuting Attorney
Cooper County
Boonville, Missouri



5/18/50

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The deputy county clerk of Cooper County is receiving a monthly salary of \$150. Cooper County is a third class county and has a population between 15,000 and 20,000. At present the deputy clerk does not receive 70% of the salary of the county clerk.

"The question is whether the sum of 70% of the salary of the county clerk is to be mandatory, or whether the county clerk has the authority to set the salary with the approval of the County Court, or whether the county court can set the salary without recommendation of the county clerk."

Section 5, Laws of Missouri, 1947, Volume I, page 491, provides:

"The clerk of the county court in each county of the third class shall be entitled to employ deputies and assistants, and for such deputies and assistants shall be allowed the following sums: In all counties having a population of less than 7,500 persons the sum of 55 per cent of the salary of the county clerk as established in Sections 1 and 2 of this act; in counties with a population of 7,500 and less than 15,000 the sum of 65 per cent of the salary of the county clerk; in counties having a population of 15,000 and less than 20,000, the sum of 70 per

Honorable Lane Harlan

cent of the salary of the county clerk; in counties having a population of 20,000 and less than 24,000, the sum of 75 per cent of the salary of the county clerk; in counties having a population of 24,000 and less than 30,000, the sum of 100 per cent of the salary of the county clerk; and in counties having a population of 30,000 or more, the sum of 125 per cent of the salary of the county clerk; provided, that the total allowance for deputies and assistants shall in no case exceed the sum of \$4,000 annually. The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed \$500 per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county; provided, that the county court shall determine that the work required to be done by such clerk or clerks demands or requires such extra remuneration."

In the case of *Alexander v. Stoddard County*, 210 S.W. (2d) 107, at 1. c. 109, the Supreme Court quoted with approval from 20 C.J.S., Counties, Section 122, as follows:

"As a general rule compensation for services rendered by assistants, deputies, and other employees can be allowed directly to them or to their superiors only as authorized by law; and where no provision is made for the payment, or for the appointment or employment of deputies and assistants, the latter must look exclusively to their employers for compensation, and such employer cannot look to the county for reimbursement. * * *"

In the present situation the Legislature has seen fit to provide for reimbursement of the county clerk for deputy and clerical hire. You will note that the statute provides that the sums fixed

Honorable Lane Harlan

"be allowed" to the county clerk for deputies and assistants. Inasmuch as the allowance is in the form of reimbursement, we feel that the Legislature has left to the county clerk the determination of what shall be paid to the deputies and assistants. The county clerk is entitled to be reimbursed within the limits prescribed in the above quoted statutory provision for his actual outlay for the hire of such help. In view of the fact that the allowance is to the county clerk in the form of reimbursement, we feel that the salary of the deputy may be fixed by the county clerk without approval by the county court. Furthermore, we do not feel that the county court would be authorized to fix the salary of the deputy, nor must the salary of the deputy in your county be fixed at 70 per cent of the salary of the county clerk. This is a matter for the determination of the county clerk, and the 70 per cent figure merely limits the amount which may be allowed to the county clerk as reimbursement. If he does not see fit to pay the deputy an amount equal to 70 per cent of his salary, his reimbursement would, of course, be limited to the amount actually paid. On the other hand the county clerk might, if he sees fit, pay the deputy more than 70 per cent of his salary, but in such event, his reimbursement would be limited to the 70 per cent.

CONCLUSION

Therefore, it is the opinion of this department that the salary of deputy county clerks in third class counties is determined by the county clerk who is reimbursed for his expenditure in accordance with Section 5 of Laws of Missouri, 1947, Volume I, page 491.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW/feh

ADJUTANT GENERAL:
MILITIA:

Cannot enter into agreement in which State would be liable for torts of Air National Guard personnel.

May 22, 1950



Brigadier General John A. Harris
Adjutant General's Office
Jefferson City, Missouri

Dear General Harris:

This department is in receipt of your recent opinion request which reads as follows:

"Reference is made to the enclosed letter from the National Guard Bureau, and your opinion is requested as to whether it is legal or proper for the Adjutant General to agree to the proposal made therein."

The enclosed letter containing the proposal in question was addressed to you and sent by Major General Kenneth F. Cramer, Chief, National Guard Bureau. This letter reads in part:

"1. This Bureau is prepared to request Headquarters, United States Air Force to continue negotiations for the acquisition of the Sheboygan Air-to-Air Gunnery Ranges for use by the units of the Missouri Air National Guard.

"2. Prior to such acquisition it is necessary that the State agree to the following:

"a. The processing of any claims for liability to cover damages to property or personnel that result from operation of aircraft by Air National Guard personnel is a responsibility of the State.

"b. The Federal Government is not liable for damages as a result of claims filed

Brigadier General John A. Harris

against the State where the operator of the aircraft is a member of the National Guard."

The question to be determined is whether or not the Adjutant General has the authority to agree, on behalf of the State, to accept liability for personal or property damages resulting from operation of aircraft by Missouri Air National Guard personnel.

It is a well-established principle of law that the State is not liable for the tortious acts of its officers, agents or employees, absent any constitutional or statutory provision assuming such liability. This rule is stated in 49 Am. Jur., States, Territories and Dependencies, paragraph 76, page 288:

"The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortious acts or conduct of any of its officers, agents, or servants, committed in the performance of their duties. In other words, the doctrine of respondeat superior does not apply to sovereign states unless through their legislative departments they assume such liability voluntarily."

It was held in Cassidy v. City of St. Joseph, 247 Mo. 197, 1.c. 205, 152 S. W. 306, that:

"Neither the State nor those quasi-corporations consisting of political subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the non-exercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to the acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute, or employees whose duties are imposed by officers and agents having general authority to do so. * * *"

Brigadier General John A. Harris

Neither the Constitution nor legislative acts of the State of Missouri provide for the State's assumption of liability for damages resulting from operation of aircraft by the Missouri Air National Guard, nor is the Adjutant General, by a constitutional provision or legislative act, given the authority to enter into an agreement assuming such liability. Since a constitutional or statutory provision authorizing such is required before such liability can be assumed by the State, it is our opinion that the Adjutant General cannot agree to the instant proposal made by the National Guard Bureau.

CONCLUSION

It is therefore the opinion of this department that the Adjutant General is without the authority to agree with a proposal made by the National Guard Bureau, under which agreement the State would be required to assume liability for personal and property damages resulting from operation of aircraft by Missouri Air National Guard personnel.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DIVISION OF HEALTH: Suggested forms of pleading to condemn unsound
FOOD AND DRUG: or contaminated food in accordance with provisions of Section 9861, R. S. Mo. 1939, Reenacted Laws 1943, page 559.

June 8, 1950

Dr. Buford G. Hamilton
Director, Division of Health
Jefferson City, Missouri



Dear Sir:

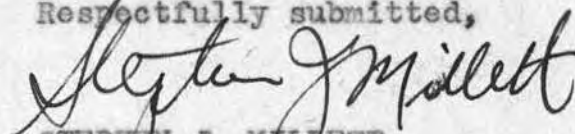
This will acknowledge your recent request for assistance in the preparation of forms of pleading in the circuit courts for condemnation of unsound or contaminated food to enforce the provisions of Section 9861, R. S. Mo. 1939, Reenacted Laws Mo. 1943, page 559.

We are attaching herewith a suggested form of petition for condemnation; a form for a temporary restraining order and a form for the judgment for condemnation. The forms, of course, may be varied by the prosecuting attorneys to fit the particular facts or circumstances arising in each case.


CONCLUSION

It is, therefore, the opinion of this department that the attached forms of pleading for condemnation of unsound or contaminated food for use in the enforcement of the provisions of Section 9861, R. S. Mo., Reenacted Laws Mo., 1943, page 559, are hereby approved.

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:


J. M. TAYLOR
Attorney General

SJM:mw

LIBEL FOR CONDEMNATION UNDER SECTION 9861(d) R. S. Mo.
1939, RE-ENACTED LAWS, 1943, PAGE 559.

IN THE CIRCUIT COURT OF _____ COUNTY, STATE OF MISSOURI.

SAMUEL MARSH,
Director, Department of Public
Health and Welfare, for and on behalf
of the Division of Health of the
State of Missouri,

Plaintiff,

vs.

Owner or Possessor of Food.

Defendant.

PETITION FOR CONDEMNATION

I.

This petition is filed by the plaintiff for and on behalf of the Division of Health of the State of Missouri in accordance with the provisions of Section 9861, R. S. Mo. 1939, Re-enacted Laws 1943, page 559, or Section 196.03, R. S. Mo. 1949. Plaintiff prays the seizure for condemnation and confiscation in accordance with the provisions of said section and other provisions of the Food and Drug Laws of the State of Missouri of the following described meat, seafood, poultry, vegetable, fruit or other perishable articles to-wit: (describe in detail the food sought to be condemned.)

II.

That the said articles were seized by the Division of Health

on the _____ day of _____ 195_____ in the County of _____, and the State of Missouri, and that said articles now remain unsold and in the original unbroken packages or cartons in the County of _____ and the State of Missouri in the possession of the said defendant at _____ (give exact location), all within the jurisdiction of this court. That the said articles aforesaid are unsound or contain filthy, decomposed or putrid substances in the following respects, to-wit: (set forth in detail in what respect the food is unsafe or is composed of filthy, decomposed or putrid substances.)

III.

That the articles aforesaid contain substances that may be poisonous or deleterious to health or otherwise unsafe.

IV.

WHEREFORE, in consideration of the premises the plaintiff prays that the articles aforesaid contained in the original packages or cartons aforesaid be proceeded against and seized for condemnation and confiscation and that they be disposed of as the court may direct in accordance with the provisions of the Food and Drug Laws of the State of Missouri and in conformity with the practice of this court; that the court grant a temporary order for the custody, storage or temporary preservation of said articles as may to the court be deemed proper and that any and all other persons or corporations having or pretending to have any right, title or claim to the said articles be cited to appear herein and answer all and singular the allegations herein set forth.

That this court may enter all such orders, decrees and judgments

as may be necessary in the premises to grant full relief to this plaintiff and for the costs of this proceeding, should such costs not be satisfied out of the proceeds of the sale of said articles, if this court should decree the same to be sold.

Prosecuting Attorney within and
for
County, State of Missouri,

Attorney for the Plaintiff,
Address: _____.

TEMPORARY RESTRAINING ORDER UNDER SECTION 9861(d), R. S. Mo. 1939,
REENACTED LAWS, 1943, PAGE 559.

IN THE CIRCUIT COURT OF _____ COUNTY, STATE OF MISSOURI.

SAMUEL MARSH,
Director, Department of Public
Health and Welfare, for and on
behalf of the Division of Health
of the State of Missouri,

Plaintiff,

vs.

Owner or Possessor of Food

Defendant.

TEMPORARY RESTRAINING ORDER

Whereas a petition, or libel, has been filed in this court on
the ____ day of _____, 195____, by _____,
prosecuting attorney within and for the county of _____,
State of Missouri, on behalf of the above named plaintiff, and
against _____, and any other owners of the
property described in said petition.

The said petition, or libel, prays that the above named
defendant and all other persons interested in the property as more
fully set forth in said petition be summoned to answer the premises,
and that said property be condemned as forfeited to the State of
Missouri.

The sheriff of _____, county, State of Missouri, is
hereby commanded to attach the following described meat, seafood,
poultry, vegetables, fruit or other perishable articles, to-wit:

(describe in detail food to be attached) and to detain the same in his custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said petition or libel, that said defendants be and appear before this court, to be held in the courthouse in the city of _____, in the county of _____, State of Missouri, on the ____ day of _____, 195__, at _____, o'clock ____ M., then and there to interpose any claims they may have for the same, and to make their allegations in that behalf. The said sheriff is hereby authorized to store the above described foods in storage facilities that will preserve the same in its present condition, and the cost of said storage shall be taxed as costs in this cause.

Said sheriff shall report on the day set above for said hearing as to what he has done in the premises and then and there make return thereof together with this writ. The clerk of this court shall issue said sheriff a copy of this writ forthwith and deliver the same to the sheriff named above. Writ of Summons shall be issued and directed to the defendant named in the caption and any other persons interested in said food directing them to appear on the date stated above.

Judge of the Circuit Court
of _____ County,
State of Missouri.

FORM FOR CONDEMNATION UNDER SECTION 9861(a) R. S. Mo. 1939,
RE-ENACTED LAWS, 1943, PAGE 559.

IN THE CIRCUIT COURT OF _____ COUNTY, STATE OF MISSOURI.

SAMUEL MARSH,
Director, Department of Public
Health and Welfare, for and on
behalf of the Division of Health
of the State of Missouri,

Plaintiff,

vs.

Owner or Possessor of Food,

Defendant.

JUDGMENT FOR CONDEMNATION

This cause coming on regularly to be heard on the ____ day of
_____, 195____, _____, Prosecuting
Attorney within and for the County of _____, and
State of Missouri, appearing for the plaintiff herein, and
_____, attorney for the defendant and
claimant herein, both parties having announced ready for trial, and
the trial having been held before the court without a jury as
provided by law, and the court having heard all the pleadings and
the evidence and argument of counsel, and having taken said cause
under submission, and

It appearing to the court that this is a libel or petition for
condemnation filed by the Director of the Department of Public
Health and Welfare, for and on behalf of the Division of Health

of the State of Missouri, and that process has been issued pursuant to the petition of said plaintiff and that the sheriff of

_____ County has received into his custody the following described articles of food, to-wit: (describe the same in detail) pursuant to the order of this court, and that he now holds the same in his custody and that due process was given on the _____ day of _____, 195____, to all persons having or claiming to have any interest in said articles charged in said libel or petition to show cause, of any they have, why an order should not be issued from this court as in said libel or petition prayed; and

It appearing to the court that said articles of food as described above are unsound, or contain filthy, decomposed or putrid substances as alleged in said petition.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the aforesaid articles of food, being _____ packages or cartons, more or less, be, and the same are hereby, condemned and forfeited to the State of Missouri; and

It appearing that said articles are now in the possession of the sheriff of _____ County and subject to destruction, the sheriff of said County is hereby ordered to destroy said articles. (or sell same for consumption by livestock)

It is further ordered that the clerk of this court furnish the sheriff of this County with a certified copy of this decree, costs taxed against the defendant.

Circuit Judge of _____
County.

ELECTIONS: Candidate nominated by use of primary ballot stating
NAME APPEARING the first two initials and the last name may appear
ON BALLOT: on the general election ballot by a first initial,
middle name and last name if, in judgment of official
whose duty it is to print the ballot, said first
initial, middle name and last name sufficiently identifies him.

October 20, 1950

Mr. Lane Harlan
Prosecuting Attorney
Boonville, Missouri



10-20-50

Dear Mr. Harlan:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"In the primary election the name of a candidate for the office of Treasurer was placed on the Democratic ballot as C. H. Cochran. The sample ballot in the primary was sent to him and he gave his approval.

"In the general election, he desires to have the name changed to C. Harrison Cochran. Harrison is his middle name. Our County Clerk has requested an opinion from your office as to whether or not this requested change is valid."

Section 11550, R.S.A. Mo. 1939, is as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

I, the undersigned, a resident and qualified elector of the _____ precinct of the

Mr. Lane Harlan

town of _____), or (the
precinct of the _____ ward of the city
of _____), county of _____
and state of Missouri, do announce myself
a candidate for the office of _____
on the _____ ticket, to be voted for at
the primary election to be held on the first
Tuesday in August, _____, and I further
declare that if nominated and elected to such
office I will qualify.

"(Signed) _____."

The candidate mentioned in your letter filed in the primary under the above quoted section and giving his name as C. H. Cochran was nominated by the voters of his party. The section above quoted requires that a candidate for nomination in the primary shall state his full name in his declaration. This candidate stated his two initials and his last name, failing to state his first and middle name and thus identified was voted upon by the voters and received sufficient votes for his nomination. We are of the opinion that notwithstanding his failure to state his full name on the ballot his nomination is valid because a designation sufficient to identify him was embodied in his declaration and placed upon the ballot and the person so designated received sufficient votes for nomination.

While the question as to whether or not a filing in the primary by use of two initials and the last name is sufficient compliance with the provisions of the above quoted section which requires the statement of the full name of the candidate in his primary declaration is not presented by your letter nevertheless we deem it to be relevant to discuss it in reaching an answer to your question as to whether a more complete statement of the name of the candidate may be used on the ballot in the general election than was set forth on the primary ballot.

In this connection we comment that while the designation of the name of the candidate in his primary declaration and on the primary ballot by the use of two initials preceding the last name might seem to fall short of full compliance with the requirement of the statute that the full name of the candidate must be embodied in the primary declaration, nevertheless, it is quite obvious that numerous candidates in filing have used only their initials and their last name and the actions of county clerks and secretaries of state in printing only initials and the last name on the primary ballot in numerous instances amount to administrative constructions of the statute to the effect that such filing constitutes compliance

Mr. Lane Harlan

with the statute which administrative constructions are at least persuasive. We comment further, however, that even if such filing does not amount to full compliance with that provision of the above quoted statute, we are of the opinion that said provision is directory and not mandatory and that to hold the nominations of a candidate so filing invalid, would amount to a disenfranchisement of those persons who voted for him in the primary. The following is a quotation from the opinion of the Supreme Court of Missouri in the case of *Bowers v. Smith*, 111 Mo. 45, 1.c. 55:

"The suffrage is regarded with jealous solicitude by a free people, and should be so viewed by those intrusted with the mighty power of guarding and vindicating their sovereign rights. Such a construction of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other."

Since we hold the nomination of the candidate in question not to have been invalidated by reason of the fact that his name appeared in his primary declaration and on the primary ballot only by his two initials and his last name, we are in a position to consider the question as to whether his name may be more fully set forth on the general election ballot by printing it as C. Harrison Cochran as he requests instead of as C. H. Cochran as set forth in the candidate's primary declaration and printed in the primary ballot.

You state in your letter that Harrison is the candidate's middle name. Since the middle initial appearing on the primary ballot was "H" such a printing of the name on the general election ballot as called for by him would not be inconsistent with the primary ballot. We are of the opinion that the provision for insertion of the full name of the candidate in his primary declaration and on the primary ballot indicates a general intent on the part of the Legislature that the candidate shall be thoroughly identified to the voters.

While we find no decision of the Supreme Court of Missouri construing the meaning of the words "full name" we desire to quote the following enlightening comment from the opinion of the Court in the case of *State v. Cornell*, 149 S.W. 2d. 815:

Mr. Lane Harlan

"* * *A person's name is the designation ordinarily used, and by which he or she is known in the community. Names are used as a method of identification. Whether the identification is sufficient is ordinarily a question of fact."

We are therefore of the opinion that the placing of the middle name of the candidate together with the first initial and the last name on the general election ballot will unquestionably amount to a more complete identification of the candidate than the printing of the first two initials and the last name as it appeared on the primary election ballot.

CONCLUSION

We are accordingly of the opinion that it is permissible for the county clerk to print the name of the candidate in question on the general election ballot as "C. Harrison Cochran" if, as a matter of fact, that name is the name ordinarily used by the candidate and sufficiently identifies him.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney

SKW:mw

Highway Patrol:
Motor Vehicles:

Highway

Patrol may approve plexiglas as safety glass.

11/27/50

October 27, 1950

FILED

37

Hon. David E. Harrison, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Mr. Harrison:

This is in reply to your recent request for an official opinion of this department which reads as follows:

"We are in receipt of a letter from the Bohm and Haas Company, makers of Plexiglas, a plastic glazing material, for approval of their product for the glazing of openings to the right and left of the driver in army type and civilian type four-wheel drive utility vehicles popularly described as Jeeps.

"Section 8391 of the Revised Statutes of Missouri 1939, defines safety glass as glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from external sources or by glass when the glass is cracked or broken.

"Plexiglas meets the specifications of the American Standards Association for the type of glazing for which approval is requested. However, since it is not actually glass but is a synthetic, organic, plastic material, we are in doubt as to our authority to grant approval for its use.

"It is respectfully requested that you inform us whether or not plexiglas may be approved for use as a glazing material under the Revised Statutes of Missouri 1939."

Hon. David E. Harrison

Section 8390, R. S. Mo. 1939, provides:

"It shall be unlawful after January first, nineteen hundred and thirty-six, to sell in the State of Missouri, any motor vehicle, manufactured or assembled after said date, and designed for the purpose of carrying passengers, unless such vehicle be equipped in all doors, windows, rear windows and windshields with safety glass."

Section 8392b, Laws of Missouri 1945, page 1201, provides:

"It shall be the duty of the Director of Revenue to refuse to issue a license for any motor vehicle manufactured or assembled after January 1, 1936 unless such motor vehicle is equipped as provided in Sections 8389, 8390 and 8391, Revised Statutes of Missouri, 1939, with such types of "safety glass" as have been heretofore approved by the Secretary of State or may hereafter be approved by the State Highway Patrol."

"Safety glass" is defined by Section 8391, R. S. Mo. 1939:

"The term 'safety glass,' as used in sections 8389, 8390 and 8392 shall be construed as meaning glass so treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from external sources or by glass when the glass is cracked or broken."

The State Highway Patrol's duty to approve various types of safety glass is provided for by Section 8392, Laws of Missouri, 1945, page 1200:

"The State Highway Patrol shall maintain a list of approved types of glass which conform to the requirement of Section 8391 and shall furnish a copy of such

Hon. David E. Harrison

list to the Director of Revenue and thereafter shall keep the Director of Revenue informed as to any changes in or additions to such list."

Assuming that plexiglas is a material which does reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from external sources or by fragments of the plexiglas when same is cracked or broken, the question is whether or not it may be approved as safety glass since plexiglas is not technically glass but rather a plastic material.

The court, in *State ex rel. v. State Board of Health*, 65 S. W. (2d) 943, 334 Mo. 220, stated with regard to statutory construction at l. c. 950:

"It may be considered trite to again observe that the primary and fundamental purpose in statutory construction is to ascertain and give effect to the legislative intent nevertheless such is always the end sought and the numerous rules for the interpretation or construction of statutes are merely aids in the quest. But such rules should not be so applied as to restrict or confine the operation of a statute within narrower limits or bounds than manifestly intended by the Legislature and whether the proper construction of a statute should be strict or liberal it certainly should be such as to effectuate the obvious purpose of its enactment and the evident legislative intent. Reference should be had to the policy adopted by the Legislature in reference to the subject matter, the object of the statute, and the mischief it strikes at or seeks to prevent, as well as the remedy provided. * * * * *

While plexiglas is not technically glass, it is a material which serves the same purpose as glass when used in motor vehicles and possesses those same qualities as glass which makes such use beneficial. Furthermore, the obvious intent

Hon. David E. Harrison

of the Legislature in passing these safety glass provisions was to require as a safety measure a material which would afford greater protection to occupants of motor vehicles and the general public present at the scene of an accident. Therefore, we feel that Section 8390, supra, is broad enough to include a material such as plexiglas if same satisfies the definition therein. A more technical interpretation would only defeat the obvious intent of the Legislature to provide the greatest protection possible to the general public in this regard.

CONCLUSION

It is therefore the opinion of this department that the State Highway Patrol has the authority to list plexiglas as an approved type of safety glass if it is found to satisfy the standards required of safety glass by Section 8390, R. S. Mo. 1939.

Respectfully submitted

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

867
J. E. TAYLOR
ATTORNEY GENERAL

RHV:A

CRIMINAL LAW:

WEAPONS, CONCEALED:

Any person, except a manufacturer or wholesaler of weapons to or from a wholesale or retail dealer therein, capable of being concealed upon the person, shall, before selling, lending, or delivering such weapon to another, first receive from such person a permit issued by the Circuit Clerk of the County in which such person resides authorizing such person to receive such weapon.

November 30, 1950

Filed 37

Honorable Lane Harlan
Prosecuting Attorney
Cooper County,
Boonville, Missouri



Dear Sir:

Your recent request for an official opinion has been assigned to me. You thus state your request:

"Re: Section 4826, R. S. Mo., 1939

"Recently I have received inquiries regarding the interpretation of the above section. From my examination of the annotated statutes I note that there has never been an appellate case interpreting this section.

"In Cooper County, some of the retail dealers abide by this section, while others have on occasion sold firearms without requesting the permit. This, of course, places the dealer who is complying with the law at a distinct disadvantage.

"I would appreciate an opinion from your office regarding an interpretation of this section and also, whether or not there is any federal law which would in any way abrogate the enforcement of this section."

Section 4826, Revised Statutes of Missouri, 1939, states:

"No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein,

November 30, 1950

for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon. Such permit shall be issued by the circuit clerk of the county in which the applicant for a permit resides in this state, if the sheriff be satisfied that the person applying for the same is of good moral character and of lawful age, and that the granting of the same will not endanger the public safety. The permit shall recite the date of the issuance thereof and that the same is invalid after thirty days after the said date, the name and address of the person to whom granted and of the person from whom such weapon is to be acquired, the nature of the transaction, and a full description of such weapon, and shall be countersigned by the person to whom granted in the presence of the circuit clerk. The circuit clerk shall receive therefor a fee of fifty cents. If the permit be used, the person receiving the same shall return it to the circuit clerk within thirty days after its expiration, with a notation thereon showing the date and manner of the disposition of such weapon. The circuit clerk shall keep a record of all application for such permits and his action thereon, and shall preserve all returned permits. No person shall in any manner transfer, alter or change any such permit or make

Honorable Lane Harlan

November 30, 1950

a false notation thereon or obtain the same upon any false representation to the circuit clerk granting the same, or use or attempt to use a permit granted to another."

A careful examination of Section 4826, Revised Statutes of Missouri, 1939, indicates that the requirements of the above section are plain and clear. The requirement is that no person, other than a manufacturer or wholesaler of weapons capable of concealment upon the person to or from a wholesale or retail dealer therein, shall sell, loan or deliver such a weapon without first obtaining, within thirty days after the issuance thereof, a permit issued by the circuit clerk of the county in which the applicant for a permit resides, authorizing such person to acquire such weapon. The section makes no exception to this rule except the exceptions stated by us.

A thorough search by us fails to reveal any Federal law which would in any way abrogate the enforcement of this section.

CONCLUSION

Any person, except a manufacturer or wholesaler of weapons to or from a wholesale or retail dealer therein, capable of being concealed upon the person, shall, before selling, lending, or delivering such weapon to another, first receive from such person a permit issued by the circuit clerk of the county in which such persons resides authorizing such person to receive such weapon.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPW:hr:lrt

DIVISION OF HEALTH: Any person who sells, delivers, or offers
DRUGS AND DRUGGISTS: for sale any new drug that has not been
tested and approved as safe for use by
either the Federal Food and Drug
Administration or the Division of Health of
Missouri shall be
guilty of a mis-
demeanor.

February 9, 1950

Division of Health
Bureau of Public Health Engineering
Jefferson City, Missouri

Dear Mr. McCutchen:



I.

In answer to the request by your Bureau for an official opinion from this office upon the following facts as stated in your letter:

"We find that since your first opinion concerning the lectures of Lelord Kordel, that Mr. Kordel has left the state.

"We have under embargo at the New Dawn Health Food Store Warehouse in St. Louis, Missouri, drugs labeled as 'Sodeum,' 'Vero B. Flex,' 'Minerals Daily,' '1-Combs' and 'Korleen.' Because of the claims made by Mr. Kordel for these drugs, we believe they are misbranded under Section 9870, paragraph (f) (1) see regulation (a). Since the New Dawn Health Food Store has sponsored these lectures we believe they have violated Section 9858, paragraph (c), also Section 9874. See also Section 9857, paragraph (k).

"We are attaching herewith a copy of the recorded lectures of Mr. Kordel in which he stated that these drugs may be obtained from the New Dawn Health Food Store.

"We request an official opinion if such oral claims for these drugs are misbranding or if the New Dawn Health Food Store is violating any other Section of the Food and Drug Laws, since they have sponsored these lectures by Mr. Kordel.

Division of Health

"Further, if the New Dawn Health Food Store has violated the Food and Drug Laws, is such a violation a misdemeanor?"

we have considered the copies of the recorded lectures of Mr. Lelord Kordel and the statutory provisions relating thereto.

II.

Section 9857, Reenacted Laws 1943, page 559, provides at subsection (h) as follows:

"(h) The term 'label' means a display of written, printed or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act, that any word, statement, or other information appearing on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper."

At subsection (j) it is stated:

"The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

The Federal Food, Drug and Cosmetic Act as enacted in 1938, 21 U.S.C.A., Section 321, has similar provisions. The courts have construed such provisions in several cases, but we cannot find any cases holding that labeling would include verbal statements or representations.

The lectures of Mr. Kordel were, without question, advertising, but we believe that the term labeling as defined in our said section 9857, supra, means labels or other written, printed or graphic material and not verbal statements. But if the labeling was misleading then under subsection (k) of said Section 9857, supra, then representations made or suggested by statement, word, design, device, sound, or in any combination thereof may be taken into account to determine the extent to which the labeling fails to label the material facts. We do not know whether or not the

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labeling on the drugs mentioned in your letter are misleading or not.

Section 9858, Reenacted Laws of 1943, page 559, prohibits the dissemination of any false advertisement and also prohibits the sale of any article in violation of Section 9871.

Mr. Kordel held himself out as the representative in said lectures of the New Dawn Food Store and stated that they were sponsoring him. If it can be proved he was their agent then they would be liable for any false advertisement or advertising that he did in said lectures.

Section 9874, Reenacted Laws 1943, page 559, defines false advertisement as follows:

"An advertisement of a food, drug, device, or cosmetic shall be deemed to be false if it is false or misleading in any material respect."

In the case of U.S. v. Lelord Kordel, 164 Fed. Rep. (2d) 913, in which he was convicted of violations of the Federal Food, Drug and Cosmetic Act, the court said that there can be no serious question about the misrepresentations contained in the literature that he put out with his drugs. The names of the drugs are given in the footnote of said case and included among others, "Fero-B-Plex," "Bolas," "Ribotabs," "Ormotabs." The pamphlet that the court considered in this case was used primarily for promoting the sale of the various products by explaining the need for each. His lectures do the same thing.

We also believe that they would be liable under Section 9871, Reenacted Laws 1943, page 559, if they were selling and offering for sale new drugs that had not been filed with the Division of Health of the State of Missouri or with the Federal Food and Drug Administration as required by said section. Section 9871, supra, provides as follows:

"(a) No person shall sell, deliver, offer for sale, hold for sale or give away any new drug unless (1) an application with respect thereto has become effective under Section 505 of the Federal Act, or (2) when not subject to the Federal Act unless such drug has been tested and has not been found to be unsafe for use under the conditions prescribed, recommended, or suggested in the labeling thereof, and prior to selling or offering for sale such drug, there has been filed with the Board an application setting forth (a) full reports

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of investigations which have been made to show whether or not such drug is safe for use; (b) a full list of the articles used as components of such drug; (c) a full statement of the composition of such drug; (d) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing and packing of such drug; (e) such samples of such drug and of the articles used as components thereof as the Board may require; and (f) specimens of the labeling proposed to be used for such drug.

"(b) An application provided for in subsection (a) (2) shall become effective on the 60th day after the filing thereof, except that if the Board finds after due notice to the applicant and giving him an opportunity for a hearing, that the drug is not safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof, the Board shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

"(c) This section shall not apply--

"(1) to a drug intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety in drugs provided the drug is plainly labeled 'For investigational use only'; or

"(2) to a drug sold in this State at any time prior to the enactment of this Act or introduced into interstate commerce at any time prior to the enactment of the Federal Act; or

"(3) to any drug which is licensed under the virus, serum, and toxin Act of July 1, 1902 (U.S.C. 1934 ed. title 42. Chap. 4).

"(d) An order refusing to permit an application under this section to become effective may be revoked by the State Board of Health."

Mr. Kordel stressed in his lectures that the drugs that they had for sale at the New Dawn Food Store were new drugs made in Missouri and for sale in Missouri. Your department has informed

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me that said drugs have not been filed with your department as required by this section and that said drugs do not come within the exceptions set forth in said Section 9871, supra.

Section 9862, Reenacted Laws 1943, page 559, reads as follows:

"It shall be the duty of the Prosecuting Attorney in any county or city in the state, when called upon by the State Board of Health, or any of its assistants, to render any legal assistance in its power to execute the laws and to prosecute cases arising under the provisions of this article. Before any violation of this Act is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the State Board of Health of its designated agent, either orally or in writing, in person, or by attorney, with regard to such contemplated proceeding. The court at any time after seizure up to a reasonable time before trial, shall, by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruit or vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyses were obtained."

The statute requires you to give the defendants notice in writing of any contemplated criminal action and to give them an opportunity to present their views before the Division of Health or its designated agent.

CONCLUSION

Any person who shall sell, deliver, offer for sale, hold for sale or give away, any new drug that has not been approved by the Food and Drug Administration of the United States Government in accordance with Section 505 of the Federal Food, Drug and Cosmetic Act or if said drug is not subject to the Federal Act, and has not been tested and approved as safe for use by the Division of Health of the State of Missouri, shall be guilty of a misdemeanor and subject to criminal prosecution, unless the said new drug comes within the specifications stated in Section 9871, Reenacted Laws, 1943, page 559.

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw

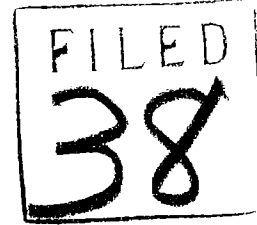
Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

DIVISION OF HEALTH: The Division of Health may require the Code of
PLUMBING CODE: Regulations prepared by the Board of Plumbing
and Sewer Inspection of St. Louis County to
provide regulations that will protect the
public health and safety.

FILED 38

February 10, 1950



Division of Health
Bureau of Public Health Engineering
Jefferson City, Missouri

Gentlemen:

I.

In response to your request for an official opinion from
this department on the following questions:

"1. Does the County Court of St. Louis County
have legal authority to place the Department
of Plumbing and Sewer Inspection in the St.
Louis County Health Department with the plumbing
supervisor administratively responsible to and
performing his functions under direction of the
St. Louis County Health Commissioner?

"2. In view of the statute creating a Department
of Plumbing and Sewer Inspection, does the
Division of Health have the authority to require
the insertion of the following provision in the
code?

"In conformity with the provisions of the
Uniform Plumbing Code of Missouri, Laws
1943, Section 10 on Page 836, and in order
that any water supply, water treatment,
water distribution system, sewage collection
system, sewage treatment system, and all
connections and appurtenances thereto,
whether public, semi-public, or private,
shall be constructed in accord with established
principles of sanitary engineering and public
health, all required plans and specifications
for construction of, alteration of, or addition
to such works shall be submitted to and
approved in writing by the Division of Health
of Missouri prior to the issuance of a permit
by the Department of Plumbing and Sewer

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Inspection.

"3. In view of the authority given the Board of Plumbing and Sewer Inspection and the Department of Plumbing and Sewer Inspection under the statutes relating to the uniform plumbing code, is the Division of Health relieved of any responsibility established by the general health statutes and the attached Division of Health Regulations pertaining to the installation, extension, and operation of public water supplies and public sewerage systems?"

we herewith submit the following discussion and conclusion of this department.

II.

In regard to the first question we find that the county court of St. Louis county, as a class 1 county has been given the power and permitted by the Legislature of the state of Missouri, to make and promulgate such rules, regulations or ordinances as will tend to enhance the public health according to the provisions of Section 9748a, Mo. R.S.A., Laws 1945, page 974, Section 1.

Therefore, would placing the Department of Plumbing and Sewer Inspection in the St. Louis County Health Department and under the direction of the deputy state health commissioner of St. Louis county enhance the public health?

The Uniform Plumbing Code of Missouri was enacted by the Legislature in 1943 for the purpose of protecting health, safety and the general welfare of the people in the counties affected by said act. It is the duty of the Deputy State Commissioner of Health and St. Louis county to enforce the rules and regulations of the Division of Health of Missouri throughout said county, outside of incorporated cities in said county which have a Deputy State Commissioner of Health according to the provisions of Section 9747, R.S.Mo. 1939.

Section 14, of Laws of Missouri, 1945, page 949, provides in part as follows:

"It shall be the general duty and responsibility
of the Division of Health to safeguard the Health
of the people in the State and all its subdivisions.
* * * * *"

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The courts of this state have consistently held that it is the duty and responsibility of the State Board of Health, now the Division of Health of the State of Missouri, to protect the public health of the people of the state.

The Supreme Court of Missouri held in the case of Lancaster v. County of Atchison, 180 S.W. (2d) 706, l.c. 708:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' Sturgeon v. Hampton, 88 Mo. 203, loc. cit. 213. Quoted with approval in the case of Morris et al. v. Karr et al., 342 Mo. 179, 114 S.W. (2d) 962, loc.cit. 964.

"Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation --not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. See State ex rel. City of Blue Springs v. McWilliams et al., 335 Mo. 816, 74 S.W. (2d) 363; State ex rel. City of Hannibal v. Smith, State Auditor, 335 Mo. 825, 74 S.W. (2d) 367, 372."

We believe that the county court of St. Louis county has no legal authority to place the Department of Plumbing and Sewer Inspection in the St. Louis County Health Department with the plumbing supervisor subject to the general direction of the Deputy State Commissioner of Health for St. Louis county. We reach this conclusion because the Legislature created a "Department of Plumbing and Sewer Inspection" by the Uniform Plumbing Code, and because the Legislature specified in that Act that the county health commissioner would serve as an ex officio member of the

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Board of Plumbing and Sewer Inspection. We believe that the power to place the Department of Plumbing and Sewer Inspection under the jurisdiction or supervision of the St. Louis County Health Department cannot be necessarily or fairly implied from the powers granted the county court of St. Louis county to make and promulgate rules and regulations that would tend to enhance the public health of that county.

In regard to your second question we have studied Section 11 of the Uniform Plumbing Code, Laws Mo. 1943, page 831, which is as follows:

"For the purpose of promoting health, safety and the general welfare and to carry into effect the purposes and provisions of this act, the county court is hereby empowered to adopt by order rules and regulations for the installations and inspection of all public or private water or plumbing facilities and appurtenances and all installations relating thereto, sewers, sewer systems, water or sewer connections, septic tank or sewage settling tank or device, and all installations related thereto. The regulations shall contain a schedule of fees to be charged for inspections which are required to be made under the provisions of this act. It shall be the duty of the Board of Plumbing and Sewer Inspection to prepare a Code of Regulations approved by the State Board of Health which shall be submitted to the county court for adoption. Before the adoption of such Code of Regulations, the Board shall hold at least one (1) public hearing thereon, fifteen (15) days notice of the time and place of which shall be published in at least one (1) newspaper having general circulation within the county and notice of such hearing shall also be posted at least fifteen (15) days in advance thereof in four (4) conspicuous places in the county."

This section requires that the Code of Regulations prepared by the Board of Plumbing and Sewer Inspection shall be approved by the State Board of Health, now Division of Health of Missouri. Since the Code must be submitted to your Division for approval before the adoption by the county court of St. Louis county, you may require the insertion of any reasonable provisions that will protect and safeguard the public health of the people of this state. Your second question refers to Section 10 of said Act, but we believe that you refer to Section 11 instead of Section 10 for your authority to require certain provisions in the Code that were supposed to be prepared after the Uniform Plumbing Code became

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law. It should not be necessary for the persons building a water supply system or sewer or sewage systems to submit their plans and specifications to two different agencies, but, after the Department of Plumbing and Sewer Inspection had approved the plans and specifications submitted to them, they could very easily refer the same plans and specifications to the Division of Health of Missouri for approval or rejection. The county court of St. Louis county has the power to require that the Code submitted to them for adoption, shall contain provisions that will tend to enhance the public health and to prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county according to Section 9748a, Laws Mo. 1945, page 974, which reads, in part, as follows:

"The county courts of the several counties of class one are hereby empowered and permitted to make and promulgate such rules, regulations or ordinances as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county; provided such rules, regulations and ordinances shall not be in conflict with any rules or regulations authorized and made by the state board of health in accordance with this chapter.* * *"

In regard to your third question, we believe that the Division of Health of the State of Missouri cannot be relieved of any responsibility established by the general health statutes to protect and safeguard the health of the people of the state and all of its political subdivisions. The Supreme Court of Missouri said in the case of Riggs v. City of Springfield, 126 S.W. (2d) 1144, 1.c. 1153:

"* * *Furthermore, the State Board of Health, under Section 9015 R.S.Mo. 1929, Mo. St. Ann. Sec. 9015, p. 4178, has imposed upon it the duty 'to safeguard the health of the people in the state, counties, cities, villages and towns.' * * *"

The Supreme Court again said in the case of Hughes v. State Board of Health, 159 S.W. (2d) 277, 1.c. 279:

"* * *it is a wholesome and well-recognized rule of law that powers conferred upon boards of Health to enable them effectually to perform their important functions in safeguarding the public health should receive a

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liberal construction. * * * *

The Supreme Court of Montana in the case of Miles City vs. Board of Health, 102 P. 696, l.c. 698, said:

"Furthermore, the right which the state is attempting to assert through the agency of the State Board of Health is a public right-- a right to protect the health of the people of the state * * * * It is now generally conceded that the police power is such a power, inherent in the state for the protection of the public, that the state may not waive or divest itself of the power to exercise it.
* * * "

Since 1883 it has been the duty of the State Board of Health, now the Division of Health of Missouri to safeguard the health of the people of this state, and all the statutes that have been enacted since that time clearly provide that it is the continuous responsibility and duty of this department of the state of Missouri to protect the health of the people of the state and this responsibility cannot be shifted to any county or municipality in this state.

CONCLUSION

It is the opinion of this department that:

(1). The county court of St. Louis County may not place the Department of Plumbing and Sewer Inspection in the St. Louis County Health Department under the general direction of the Deputy State Health Commissioner of St. Louis county.

(2). The Division of Health has authority to require the insertion of specific provisions relating to the protection of the public health in the Code of Regulations to be prepared by the Board of Plumbing and Sewer Inspection of St. Louis county. The following provisions could be required:

"In conformity with the provisions of the Uniform Plumbing Code of Missouri, Laws 1943, Section 10 on Page 836, and in order that any water supply, water treatment, water distribution system, sewage collection system, sewage treatment system, and all connections and appurtenances thereto, whether public, semi-public, or private, shall be constructed in accord with established principles of sanitary engineering and public

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health, all required plans and specifications for construction of, alteration of, or additions to such works shall be submitted to and approved in writing by the Division of Health of Missouri prior to the issuance of a permit by the Department of Plumbing and Sewer Inspection."

(3). The Division of Health was not relieved of any responsibility established by law to protect the public health of the people of this state by the enactment of the Uniform Plumbing Code of 1943.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General

SJM:mw

DIVISION OF HEALTH: All funds received by the Division of
FUNDS: Health must be deposited in the state
VITAL STATISTICS: treasury.

March 29, 1950

Filed: #38

Honorable Samuel Marsh
Director, Department of Public
Health and Welfare
Jefferson City, Missouri



Dear Sir:

I.

We received a request from you for an opinion from this department upon the following statement of facts:

"During the interval between the death of Dr. Adams and the appointment of a new division director for the Division of Health, I assumed direct supervision over the Division of Health.

"One of the items that came to my notice was that for many years the Directors of the Division of Health have entered into contracts on an individual basis with the National Office of Vital Statistics of the United States Public Health Service of the Federal Security Agency in Washington, D.C., to furnish certain data from the records of the Bureau of Vital Statistics of the State Division of Health.

"Under these contracts the funds received for that service were deposited in a checking account in the Central Missouri Trust Company in the individual name of the division director, and out of that fund the division director paid the salaries of certain employees who were engaged by the Division Director to do the necessary work to fulfill the contract with the Federal Agency.

"When this contract came up for renewal Dr. Adams, the then Director of the Division of Health, signed the contract as follows:

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"Missouri Division of Health
C. F. Adams, M.D., Acting Director"

"However he continued to maintain the account in the Central Missouri Trust Company, but the name of the account was changed from Dr. R.M. James, Agent, to Missouri Division of Health, C. F. Adams, M.D., Director. Dr. Adams continued to pay the salaries of the employees who were doing the work out of this account, but these particular employees' were never brought under the State Merit System Law.

"I would like your opinion as to how these funds should be handled."

II.

The Constitution of 1945, Article III, Section 36 provides, in part, as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:"

* * * * *

The Constitution of 1945, Article IV, Section 28, provides as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general

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accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Section 22 of Article IV, Constitution 1945, provides that all taxes, licenses and fees payable to the state shall be collected by the Division of Collection of the Department of Revenue.

Section 9759.20 R.S.A., Laws 1945, page 945, Section 20, provides as follows:

"It shall be the duty of the division of health to have charge of the state system of registration of births and deaths; to prepare the necessary methods, forms and blanks for obtaining and preserving such records, and to insure the faithful registration of the same in the registration districts and in the central bureau of vital statistics at the capital of the state. The said division shall be charged with the uniform and thorough enforcement of the said law throughout the state and shall, from time to time, promulgate any additional forms and amendments that may be necessary for this purpose. Suitable provision shall be made, including fireproof vaults and filing cases, for the permanent and safe preservation of all official records and other matters pertaining to vital statistics for which the bureau of vital statistics may be responsible."

Section 9783.18, R.S.A., Laws 1947, Vol. 2, page 237, Section 19, provides that the fees charged by the state registrar for birth or death certificates shall be paid by the applicant to the State Department of Revenue.

The Supreme Court in the case of Moore v. Brown, 350 Mo. 256, 165 S.W. (2d) 657, held that Section 43 of Article IV of the Constitution of 1875 requires that all revenue collected and moneys received by the state from any source whatsoever shall go into the treasury and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury except in pursuance of regular appropriations made by law.

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The Supreme Court of Missouri in Howell v. Division of Employment Security, 215 S.W.(2d) 467, fully considered the provisions of the Constitution of 1945. In this case they held that the word revenue means the annual and current income of the state, however, derived, which is subject to appropriations for general public uses:

" * * * The annual and current income of the state, however derived, which is subject to appropriation for general public uses. This excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use, or which is not required to be paid into the state revenue fund but into a special fund. * * * "

Section 9735a R. S. Mo. 1939, provides as follows:

"The State Board of Health is hereby directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States appropriated by Congress for Health purposes and to comply with any of the rules or conditions made by the United States Public Health Service, The Children's Bureau or any other Federal Agency in regard to health funds distributed to the states, and to comply with any of the rules and conditions made by said services or bureaus or other branches of the United States Government acting under the provisions of the Federal law in order to secure for the State of Missouri funds allotted to this state by the United States Government or health purposes under the provisions of such acts of Congress, relating to health; said funds shall be received by the State Treasurer and deposited in separate funds to be known as the United States Public Health Title VI fund, the Venereal Disease Control fund, the Children's Bureau fund, and any other fund specially

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Bureau fund, and any other fund specially designated by a Federal Agency for the use of the State Board of Health for health purposes, and to be paid out by the State Treasurer on requisitions drawn by the executive officers of the State Board of Health on a warrant of the State Auditor. Said funds being allotted to the State of Missouri for health purposes by the Federal Government the General Assembly shall appropriate the same to the use of the State Board of Health, under such provisions as are set out for the reception and use of funds by the Federal Government. Added Laws 1941, p. 370, Sec. 1."

This section was in force at the time of the making of the attached contract, to which you refer in your letter. Said section has been repealed by Senate Revision Bill No. 1051 and in lieu thereof Section 3 at page 972 of Laws 1945, has been substituted therefor in the revision laws. This revised section is not as broad as Section 9735a.

Section 6.060 of H.B. No. 27 of the 65th General Assembly provides as follows:

"In order to secure to the state federal funds allotted or available, the Director of the Division of Health, the State Comptroller, and the State Treasurer, respectively, are hereby authorized and directed to receive, deposit, expend and dispense any allotments, advancements, grants, or contributions of federal funds as United States Public Health Service Title VI funds, Venereal Disease Control Funds, Children's Bureau Title V, Part 1, funds or any other federal health funds, for health purposes, and to comply with the provisions of any act of Congress, or with any rule, regulation or condition of any agency of the United States acting under the provisions of federal law providing for the allotment and expenditure of such funds; and should any such act, rule, regulation or condition require the deposit of any such funds in the State Treasury or in a trust fund or with the Division of Health, State Comptroller or Treasurer, as trustee, then the said Division of Health, State Comptroller and Treasurer are hereby authorized

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and directed to receive, deposit and expend such funds in the manner required by such act, rule, regulation or condition, and all such funds so deposited shall stand and are hereby appropriated to said Division of Health, State Comptroller and Treasurer to be applied in the manner and for the purposes set forth in such act, rule, regulation or condition. When required by such act, rule, regulation or condition, the State Auditor is hereby authorized and directed to audit and issue warrants for, the State Treasurer is hereby authorized and directed to receive, deposit and handle, as trustee or otherwise, any such funds and to pay out same, all in the manner required by such act, rule, regulation or condition; and for such purposes there is hereby appropriated all such federal funds so deposited in the State Treasury for the biennial period beginning July 1, 1949, and ending June 30, 1951, the amount hereby appropriated, being in addition to all other appropriations made by this act."

Section 6.060 of H.B. 27, quoted on page 5 of this opinion, provides that allotments, advancements, grants or contributions of federal funds stand appropriated to the Division of Health. If this provision of an appropriation Act were to be held valid the moneys involved under the attached contract still would not be allotments, advancements, grants or contributions of federal funds because the money is paid for services rendered, and therefore the section or statute cannot be construed to apply. Section 9735a, quoted above in this opinion, would not apply for the same reason, and also would not apply because it will be repealed effective April 14, 1950. The attached contract, in our opinion, provides that in return for so much money per name, to be paid by the federal government, the Missouri Division of Health agrees to perform certain services so that this contract is no different from any other contract that the state of Missouri might enter into with the federal government or any individual. The money paid for this service cannot be deemed to be a special fund allotted or allocated to Missouri and the Division of Health by the federal government.

But it is clear to us that under the constitutional provision cited above, it is the duty of the Division of Health to pay to the treasury of the state of Missouri the money received from the United States Public Health Service for said services

Hon. Samuel Marsh

in connection with this attached contract.

The responsibility to see that this payment is made rests upon you and the Director of the Division of Health.

CONCLUSION

It is the conclusion of this department that all monies received from the United States Public Health Service for data and information furnished to said federal government agency from the records of the Bureau of Vital Statistics of the Division of Health in accordance with the terms of the attached contract shall be deposited in the state treasury and that said monies are not appropriated by any existing law.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Federal Security Agency
U. S. PUBLIC HEALTH SERVICE
National Office of Vital Statistics

Contract No. 40005
Date July 1, 1949

CONTRACT FOR MICROFILM

For and in consideration of the payment of three cents (\$0.03) for a complete positive microfilm copy of each birth, death, and stillbirth certificate furnished during the current fiscal year, in accordance with U.S. Public Health Service specifications as issued annually, the undersigned bidder offers and agrees to furnish to the United States Government, as represented by the U. S. Public Health Service, positive microfilm copies of certificates of births, deaths and stillbirths which will have occurred on or after January 1, 1946, in the State of Missouri,

It is understood that this agreement does not cover copies of certificates for which payment has been made; that the Government, upon 30 days' advance notice to the contractor, may renew the contract from fiscal year to fiscal year for a period not to exceed five (5) years under the terms and conditions herein specified; that the contract may be terminated at any time by either party upon 10 days' notice, that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom unless it is made with a corporation for its general benefit; and that the contractor and any subcontractor shall not discriminate against any worker because of race, creed, color, or national origin.

Other exceptions and provisions: The undersigned bidder agrees to furnish positive microfilm copies of certificates of births, deaths and stillbirths occurring in 1948 for which payment has not been made.

State Office Bldg.
Bidder: Missouri Division of Health. Address: Jefferson City, Mo.
(Name of State agency)

By: s: C. F. Adams, M.D. Acting Director Division of Health
C. F. Adams, M.D.

ACCEPTED BY THE UNITED STATES
PUBLIC HEALTH SERVICE

Date July 1, 1949

By R. M. Harvey, Acting Chief, Office of Purchase and Supply
(Name and title of official)

DIVISION OF HEALTH: The attached report and order in regard to hearing
REPORT AND ORDER: held in Eldon, Missouri on March 21, 1950,
by the Director of Public Health and Welfare and
the Director of Division of Public Health is here-
by approved as to form and legal content.

March 31, 1950

Dr. Buford G. Hamilton
Director, Division of Health
Jefferson City, Missouri

Dear Sir:



I.

This department received a request from Mr. L. E. Ordeltelheide, Director of the Bureau of Public Health/Engineering, to review the attached report and order of Mr. Samuel Marsh, Director, Department of Public Health and Welfare, and of Dr. Buford G. Hamilton, Director of the Division of Health.

II.

A full copy of said report and order in the matter of the adequacy and effectiveness of the existing sewage treatment plant, built in 1929, owned and operated by the City of Eldon, Missouri for treating the sewage wastes from said City is hereto attached and is considered a part of this opinion.

Section 37 of Article IV of the Constitution of Missouri, 1945, provides:

"The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

Section 1, Laws 1945, page 945, provides, in part, as follows:

"There is hereby created and established as a department of state government a department of public health and welfare, which may hereafter be referred to as the department. The scope and purpose of the department of public health and welfare shall be to improve and protect the

Dr. Buford G. Hamilton

health of the people of the State of Missouri;
* * *

Section 5, Laws 1945, page 945, provides, in part,
as follows:

"The director of public health and welfare shall have power to make inquiries and investigations and to hold such hearings as may be necessary in pursuance of his duties, and for such purpose shall have authority to subpoena witnesses, administer oaths and provide for payment and expenses of witnesses."

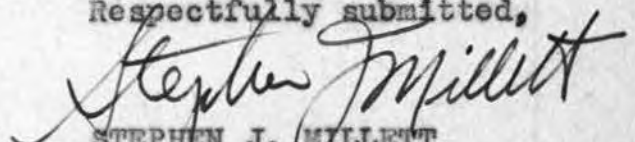
A full discussion of the cases relating to the power of the Division of Health to regulate sewage systems in this state and to prevent a municipality from creating a public nuisance is contained in an opinion of this department issued March 10, 1949, to William Lee Dodd, prosecuting attorney of Ripley county.

Therefore a further discussion of the powers and duties of the Division of Health and the Department of Public Health and Welfare is not necessary. It is clear that the Director of the Department of Public Health and Welfare has the power to make inquiries and to hold such a hearing as was held at Eldon, Missouri on March 21, 1950. It is also clear that it is the duty and responsibility of the Division of Health to safeguard the health of the people in the state and all its subdivisions and to make such orders as will prevent public nuisances that endanger the health of the people of this state. The report and order in regard to the hearing held at Eldon, Missouri on March 21, 1950, which is hereto attached has been reviewed by this department from the standpoint of form and legal content.

CONCLUSION

The attached report and order in regard to the hearing held in Eldon, Missouri on March 21, 1950, by the Director of the Department of Public Health and Welfare and the Director of the Division of Health is hereby approved as to form and legal content.

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General


SJM:mw
Enc.

BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE AND
THE DIVISION OF HEALTH OF THE STATE OF MISSOURI

In the matter of the adequacy and effectiveness of the
existing sewage treatment plant, built in 1929, owned and
operated by the City of Eldon, Missouri for treating the
sewage wastes from said City. } Case No. 1

REPORT AND ORDER

This case is before the Department of Public Health and Welfare, represented by Samuel Marsh, Director, and the Division of Health of said Department, represented by Dr. Buford Hamilton, Director, as a result of repeated complaints from riparian owners living along and abutting Blythe's Creek into which the sewage from the City of Eldon is discharged after treatment, and below the point at which the sewage plant effluent is discharged into said stream.

A hearing was held in Eldon, Missouri, on March 21, 1950, at which time all interested parties were given an opportunity to be heard and the case has been reviewed on the record.

The evidence shows that studies were made of the operation of the Eldon sewage treatment plant and that said plant was found to be properly operated by the personnel but the plant is overloaded. The evidence further shows that the various units of the Eldon sewage treatment plant were, on the basis of present design standards in use by the Division of Health, overloaded, to the following extent: (1) Imhoff tank settling compartment—150%; (2) Imhoff tank sludge compartment—256%; (3) Dosing tank—satisfactory for existing filter; (4) Trickling filter—271%; (5) Sludge drying bed—392%; (6) Final settling tank—none provided.

The evidence further shows that the average bio-chemical oxygen demand of the plant effluent during a study made during the period August 22 to September 2, 1949, was 169 parts per million, excluding the first three days results, and that the average observed efficiency of the plant during the same period was 54.9%. Considering that the effluent from a well operated plant of this type should not exceed thirty parts per million of bio-chemical oxygen demand on the average and should operate at an efficiency of 90%, the polluttional material being discharged into Blythe's Creek appears excessive. This was further borne out by the bio-chemical oxygen demand of samples from Blythe's Creek collected at the same time from points 100 yards below the sewage treatment plant; about 3/4 miles below the sewage treatment plant; and about 1 1/2 miles below the sewage treatment plant. Although the recovery of Blythe's Creek from a heavily polluted condition was rapid as evidenced by an average B.O.D. from the three stations listed above of 130 p.p.m., 37 p.p.m., and 8 p.p.m. respectively, the testimony of those living near the creek below the plant shows that pollution conditions at times carry as far as Olean, Missouri, which is approximately six stream miles from the point at which the effluent of the Eldon plant discharges.

The evidence of riparian owners of land along Blythe's Creek about the odors from the Creek and the physical appearance of the Creek and its bed proves that serious pollution conditions exist; that the pollution conditions have grown worse in recent years; that such pollution conditions have resulted in the destruction of property values, the loss of the use of the stream by riparian owners and others, and severe and grievous public

nuisance conditions during periods when no surface runoff occurs to flush the stream. We find that the low dissolved oxygen content observed during the study of August 22 to September 2 unquestionably has resulted in the destruction of the fish and other aquatic life which existed in Blythe's Creek prior to the time pollution conditions developed.

We find there is no question but what there is the presence of disease producing microorganisms in Blythe's Creek below the sewage disposal plant, and the hazard thus created to those living near the stream or utilizing it in any manner is a public nuisance. We find that human fecal material is contained in the sewage; that the existing sewage treatment works of Eldon, Missouri are inadequate to provide a satisfactory degree of treatment; and that natural purification processes resulting in the destruction of harmful bacteria are not allowed sufficient time to operate at the said plant; and we further find that Blythe's Creek in its present condition constitutes a public nuisance and a potential and actual hazard to the public health of the people in this area. We find that flies, mosquitoes and other insects are capable of carrying disease producing microorganisms considerable distance from the source, and that they exist in Blythe's Creek. Therefore, the residents of the City of Eldon are themselves endangered by their own wastes.

The fact that no evidence was presented that the plant is adequate and that no pollution exists or has existed, although responsible city officials were present at the hearing, is likewise considered significant. Further, the evidence to the effect that the pollution might arise from or be greatly augmented by wastes from scattered septic tanks connected to

storm sewers or from scattered residences and business establishments either not connected to the Eldon sewerage system or located below the sewage treatment plant, must be discounted because of the magnitude of the pollution and the fact, brought out in the hearing, that the laboratory results do not indicate these factors to be of significance.

Having reviewed the evidence presented at the hearing, we find that the existing sewage treatment works at Eldon are inadequate and that as a result of their inadequacy, pollution conditions are created in Blythe's Creek below the point of discharge of the effluent from said plant, and that the same constitutes a public nuisance. We further find that these conditions are in violation of Sections 7 and 9 of Regulations of the Division of Health Governing the Installation, Extension and Operation of Public Sewerage Systems, which Sections 7 and 9 of Regulations of the Division of Health Governing the Installation, Extension and Operation of Public Sewerage Systems read as follows:

"Sec. 7. Disposal of Sewage — No sewage shall be placed or permitted to be placed or discharged or permitted to flow into any of the waters or upon any of the lands of the State in any manner determined by the Division of Health to be prejudicially affecting a public water supply or causing a nuisance.

"Sec. 9. Alterations or Changes in Operation Required. If, after investigation, the Division of Health finds that any sewerage system is in any way a menace to health on account of defective design, inadequacy, incompetent supervision or inefficient operation, or the sewage effluent is such as to cause other unsatisfactory conditions, such alterations and additions in the design or the construction or the equipment, or such changes in the operation of the plant as are necessary to produce satisfactory results shall be made in

accordance with recommendation of, and within the time limits set by, the Division of Health."

It is, therefore,

ORDERED: 1. That the City of Eldon construct and operate such additional sewage treatment facilities as may be needed to properly treat the sewage wastes from the City of Eldon and abate the pollution conditions and public health hazards which now exist in Blythe's Creek.

ORDERED: 2. That such works be constructed and placed in operation within a period of twelve months from the date of this order.

ORDERED: 3. That plans and specifications for such improvements be approved in writing by the Division of Health before any contract is let or construction work started.

ORDERED: 4. That this order shall take effect on this date and that certified copies of the order shall be served on proper officials of the City of Eldon.

Samuel Marsh, Director
Department of Public Health and Welfare

Buford G. Hamilton, M. D., Director
Division of Health

Dated this _____ day of _____,

1950 at Jefferson City, Missouri.

LIQUOR CONTROL: Liquor by drinks license cannot be
AIRPORTS: issued for premises on airport constructed by city outside its corporate limits.

January 3, 1950



Mr. Covell R. Hewitt, Supervisor
Department of Liquor Control
State Office Building
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent opinion request which reads in part as follows:

"Mr. Loyd Roberts, City Attorney of Joplin, Missouri, has requested me to request you to render an opinion as to whether or not the Supervisor of Liquor Control may issue a license to sell liquor by the drink at retail for consumption on the premises where sold under the circumstances set forth in his letter to me dated November 28, 1949."
* * * * *

Mr. Roberts' letter reads in part:

"The City of Joplin, a municipal corporation of the Second Class, has constructed, owns, operates and maintains an airport some two miles north of the official corporate boundaries of this city. * * * * *

"An airport terminal building has just been completed at an approximate cost of \$275,000.00 which contains space for the operation of a restaurant. One third of the ground floor and a portion of the basement has been designed for this purpose. * * * * *

"Our Airport Board is interested in securing a lessee for the restaurant facilities in the terminal building and while a number are interested, so far they have failed to make an offer because they question whether or not

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they would be lawfully entitled to serve intoxicating liquor by the drink on said premises."

The question presented is whether or not the Supervisor of Liquor Control has authority to issue a license for the sale of intoxicating liquor by the drink at retail for consumption on the premises, where such premises are situated at the airport constructed and operated by the City of Joplin, which airport is situated at a distance of two miles from the corporate limits of the City of Joplin. We assume that it is the sale of intoxicating liquor other than malt liquor containing not in excess of five (5%) per cent by weight that is contemplated.

Section 4890, R.S. Mo. 1939, of the Liquor Control Act provides in part:

"Provided further, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities." * *

The question that remains then is whether or not the airport in this instance is within the limits of Joplin as intended by the Liquor Control Act.

Since the Act does not define the words "limits of such incorporated cities" for the purposes of the Act, we feel that it is necessary to consider the "limits of such incorporated cities" to be the corporate limits as established by the general law regarding such cities. These limits are fixed by charter and may thereafter be extended or reduced as provided by law. It is a fundamental principal of law relating to municipal

corporations that the power to enlarge or diminish the corporate limits of municipal corporations lies solely in the legislature, which has granted to cities of the second class the authority to extend or diminish their limits. Section 6606, R.S.Mo. 1939, provides the method to be employed.

The airport is situated two miles from the corporate limits of the City of Joplin. Article 3 of Chapter 123, R.S. Mo. 1939, provides the authority for the construction, maintenance, operation, and regulation of this airport by the City of Joplin. Section 15122 of Article 3 provides that:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either within or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

This Section, therefore, recognizes that a city may wish to construct such airport without the corporate limits of the city, and specifically provides that such may be done. No authority can be found in Article 3 of Chapter 123, R.S. Mo. 1939, which provides that the site of an airport built by a city without the city limits shall thereby become part of the corporate limits of such city.

That one might take the view that this license can properly be issued, it would be necessary to hold that the airport area is within the limits of the City of Joplin.

1-3-50

This is not true geographically, nor can it be justified legally. This department, in an official opinion addressed to the Honorable Hugh P. Williamson, and dated July 10, 1948, (copy enclosed), has held that a city of the third class is not vested with police power over an airport constructed by it outside its corporate limits. We feel that this ruling applies as well to cities of the second class. Therefore, we see that even for the purpose of the exercise of police power, an airport constructed by a city outside its limits cannot be considered to be legally within its limits.

In the case of *Borders v. State*, 66 S.W. 1102, the construction of a statute prohibiting gaming for money within the limits of any city on Sunday was in question. The Texas Court, at l.c. 1103, held:

"* * * We understand that title 18, Sayles' Rev. Civ. St., relates to cities and towns and their incorporation; and it would appear from various articles therein contained that such city or town, whether incorporated under the general law or a city having a charter granted by the legislature, must have certain defined limits. We hold that the charter granted the city of Waxahachie fixed the limits of said city, and, although there may be a collection of houses outside or proximate to the corporate limits, this is not an integral part of said city, and cannot become so until it is brought within the municipality by some mode provided by law. * * * In our view, when the legislature used the term 'city limits' in the Sunday gaming statute, they meant the corporate limits of such city. * * * * *"

From the foregoing we must conclude that the proposed

Mr. Covell R. Hewitt, Supv.

1-3-50

license cannot be issued, as the airport is situated without the corporate limits of the City of Joplin, and, therefore, Section 4890, supra, specifically prevents the issuance of said license.

CONCLUSION.

It is therefore, the opinion of this department that the Supervisor of Liquor Control has no authority to issue a license for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, where such premises are situated at the airport constructed and operated by the City of Joplin, which airport is situated at a distance of two miles from the corporate limits of the City of Joplin.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Enclosure

RHV:p

DISPLAY OF LIQUOR LICENSE:

A wholesale liquor dealer who does not display his license on the premises described in his license is in violation of the Rules and Regulations of the Supervisor of the Department of Liquor Control.

April 21, 1950

FILED
39



Honorable Covell R. Hewitt
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I wish you would please prepare for me your official opinion on the following question:

"There is a liquor wholesale solicitor in this state who has a license issued to him at the address of a transfer and storage company and the intoxicating liquors which he has on hand are stored with a transfer and storage company at the same address which appears on the license, and the office of this liquor wholesale solicitor is in a regular office building in Kansas City, Missouri, many blocks from the storage company building, and he has the liquor wholesale solicitor's license posted in his uptown office.

"I wish you would please advise me whether or not this is permissible under the Intoxicating Liquor Law of the State of Missouri, and I refer you to Section 4881, R. S. Mo. 1939, and particularly to the latter part of Section 4897, R. S. Mo. 1939."

Section 4881, R. S. Mo. 1939, states:

"No person, agent or employee of any person in any capacity shall sell intoxicating liquor

Hon. Covell R. Hewitt

in any other place than that designated in the license, or at any other time or otherwise than is authorized by this act, and the regulations herein provided for."

The latter part of Section 4897, R. S. Mo. 1939, states:

"* * * Every license issued under the provisions of this act shall particularly describe the premises at which intoxicating liquor may be sold thereunder, and such license shall not be deemed to authorize or permit the sale of intoxicating liquor at any place other than that described therein. Applications for renewal of licenses must be filed on or before the first day of May of each calendar year."

From your letter it is not clear to us whether this licensee receives orders at his uptown office and makes sales from there, or whether he has an employee at the warehouse where the liquor is stored and that sales are made from that place. Since Section 4881 and 4897 relate to the place where sales of liquor may be made, and since your letter does not indicate where the sales in the instant case are made, we cannot express our opinion whether in this case there is a violation of Sections 4881 and 4897. However, it is perfectly clear that by having his license posted in his uptown office, and not at the place where his liquor is kept and where he is licensed to do business, that this licensee is in violation of Section (b), of Regulation No. 3, of the Rules and Regulations of the Supervisor of Liquor Control, 1946.

Section (b) reads, in part as follows:

"Before commencing or doing any business for the time for which a Missouri State license has been granted, said license shall be posted and, at all times during the term of the license, kept displayed in a conspicuous place on the premises where such business is carried on, so that all persons visiting the premises may readily see the same.

"No licensee shall post such license or allow such license to be posted upon premises other than the premises licensed, or upon premises where traffic in intoxicating liquor or non-intoxicating beer is being carried on by any person other than the licensee, or knowingly deface, destroy or alter any such license in any respect."

(Underscoring ours.)

Hon. Covell R. Hewitt

CONCLUSION

It is the opinion of this department that a wholesale liquor dealer who does not display his license on the premises described in this license is in violation of Section (b), Regulation No. 3, of the Rules and Regulations of the Supervisor of the Department of Liquor Control.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

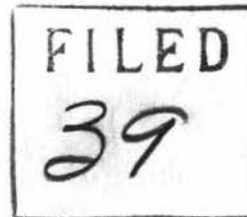
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MAGISTRATES) Salaries of Magistrates for terms beginning
) January 1, 1951, determined by assessed
) valuation for Year 1949.

December 6, 1950

12/7/50

Honorable Cline C. Herren
Judge of the Probate and
Magistrate Courts
Webster County
Marshfield, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"At page 773 Laws of Missouri 1945 under Section 17 governing the salaries payable to Magistrates, among other things, states: 'For the purposes of this act, the assessed valuation of all real and tangible personal property in the respective counties as last determined by the Commission or other body provided by law for the equalization of taxes as between the counties next prior to the year for election of such Magistrates, shall be deemed to be the assessed valuations for the ensuing terms of such Magistrates.'

"Our population according to the 1950 census will decrease from 17,226 to slightly above the 15,000 mark, however, I understand that our assessed valuation has been set for 1950 to slightly more than \$11,000,000.00 an increase from \$9,317,129.00 in 1949. Will the salary for the coming term be fixed according to the valuation set by the state board in 1950 or will we be forced to use the valuation set for 1949 which is below the \$11,000,000.00 mark?

"Will the clerical allowance for my county be set according to the 1950 assessed valuation

Honorable Cline C. Herren

or the 1949 assessed valuation?

"I will appreciate your early attention to this matter so that we may requisition the proper amounts for the January 1951 salaries."

Section 17, referred to in your opinion request, fixes the salaries of magistrates. In counties having a population of more than 11,000 but not more than 17,000 inhabitants with an assessed valuation of more than \$11,000,000.00 the salary is fixed at \$3600.00. In counties having such population but with an assessed valuation of \$11,000,000.00 or less the salary is fixed at \$3000.00. Section 22 of said act fixes the amount which the state may pay on salaries of clerks of the magistrate court. In counties having a population of more than 11,000 but not more than 17,000 inhabitants with an assessed valuation of more than \$11,000,000.00 the sum of \$1500.00 is allowed for clerical hire. In such counties having an assessed valuation of \$11,000,000.00 or less the sum of \$1200.00 per year is allowed.

We believe that the provision of Section 17, quoted in your opinion request, is clear and requires the 1949 assessed valuation to be used in determining the salary of the magistrates for the term beginning January 1, 1951. This provision states that the assessed valuation as determined by the State Tax Commission "next prior to the year for election of such magistrates" shall be used as the assessed valuation for the ensuing terms of the magistrates. The year next prior to the year for election is, of course, 1949. Inasmuch as the election of magistrates was held on November 7, 1950, we think that under the statutory provision, there is no alternative to the use of the assessed valuation for the year prior to the year of such election.

We feel that the same figure must be used for determining clerical salaries. There is no provision in the section fixing the amounts payable for clerical help specifying the year which must be used in determining the assessed valuation. However, Section 17 states that the assessment there specified shall be used "for the purposes of this act." Therefore, we think that it would apply throughout the act, and, therefore, determine the year which must be used for the assessed valuation in fixing amounts payable for clerical hire.

Honorable Cline C. Herren


CONCLUSION

Therefore, it is the opinion of this department that under the provisions of Section 17, Laws of Missouri, 1945, the assessed valuation for counties for the purpose of determining magistrates' salaries for the terms beginning January 1, 1951, and for the allowances for clerical hire during such terms is the assessed valuation of the county as determined by the State Tax Commission for the Year 1949.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General



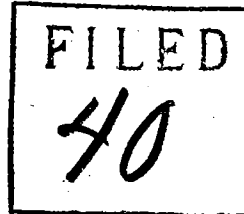
J. E. TAYLOR
Attorney General

RRW/feh

ELECTIONS: A county may conduct a special election for distribution of school funds on the same date, and with the same officials as are employed in the forthcoming gasoline tax referendum.

January 28, 1950

Honorable Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Mr. Hibbard:

We have your recent letter in which you request an opinion from this office. The pertinent portion of your letter is as follows:

"The provisions of Section 10376, et seq, provide for a special election by the qualified voters of the respective counties to determine the question of distribution of accumulated school funds, said election to be held either as a special election or as a general election in said county upon proper notice.

"The voters of Marion County have filed petitions bearing the necessary number of signatures to hold this election and it is the desire of the County Court to hold the election on the same date and using the same election officials that will be used in the state-wide gasoline tax referendum in April. The question of law involved, is whether or not there is authority to do so."

You have, since the date of your letter, informed us that the statement in your letter that the petitions have been filed was erroneous; that the facts are that the petitions have only been prepared for filing.

As you suggest in your letter, the relevant statutes are as follows:

Laws of Missouri, 1945, Section 10376, page 1628:

"It is hereby made the duty of the several county courts of this state to collect diligently and, when authorized by law, to invest

January 28, 1950

securely the proceeds of all moneys, stocks, bonds and other property belonging to or accruing to the county school fund. On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school fund of the county shall be reinvested in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund; Provided, that all interest accruing from such reinvestment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected for any breach of the penal laws of the state, the net proceeds from the sale of estrays, and all other money lawfully coming into said fund, shall hereafter be collected and distributed annually to the school of the county as hereinafter provided in this article."

Laws of Missouri, 1947, Vol. I, Sec. A, page 285, is as follows:

"That Section 2 of an Act of the 63rd General Assembly, known as Senate Bill No. 186, approved March 26, 1946, entitled 'AN ACT To provide for holding elections in the several counties and the City of St. Louis upon the proposal to distribute annually the capital of the liquidated school funds, with an emergency clause.', be and the same is hereby repealed and two new sections be enacted to be known and designated as Section 2 and Section 2a, both relating to the holding of elections in the several counties and the City of St. Louis upon the proposal to distribute annually the capital of the liquidated school fund, and to read as follows:

Section 2, supra, is in part as follows:

"Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor or at the next general election held in such county. Notice of such election shall be given by publication in some newspaper of general circulation within the county or City of St. Louis for not more than two weeks, the last insertion to not be longer than one week prior to the date of such election. The proposal shall be submitted on a ballot in substantially the following form:

"For annual distribution of the capital of the liquidated county and township school funds.

"Against annual distribution of the capital of the liquidated county and township school funds.

"Said ballot shall carry upon it instructions to the voters to strike out the statement not indicating their preference. The voting shall take place at the regular election precincts in the area wherein such election shall be held, unless the election districts or precincts are consolidated as hereinafter provided, and the judges and clerks thereof shall be selected by the board having authority to make such appointments for general elections. Judges and clerks shall be the same in number at each election precinct as is provided by law for general elections, unless reduced in number as provided in Section 2a; and they shall receive the same compensation as may be provided for judges and clerks serving at general elections. The costs incident to such election shall be paid by the county wherein such election is held or by the City of St. Louis. Such special election shall be governed in all respects by the general election laws except wherein such general election laws are in conflict with this article.

* * *

January 28, 1950

Section 2a, supra, is as follows:

"The county courts in the several counties of this state in relation to any election upon the proposal to distribute annually the capital of the liquidated school fund shall have the power and authority, in its discretion, to consolidate two or more election districts or precincts in their respective counties, and to use in such election districts or precincts the number of judges and clerks, not to exceed two each, that it may deem necessary."

The most significant section, for our purposes, are those parts of Section 2, Laws of Missouri, 1947, supra, reading as follows:

"* * * and the judges and clerks thereof shall be selected by the board having authority to make such appointments for general elections.

* * * * *

"Said proposal shall be submitted at a special election to be held for that purpose * * * or at the next general election held in such county.
* * *"

It appears from the above quoted sections that the election for distribution of the county school funds may be held at a special election and that the judges and clerks thereof shall be selected by the board which makes the appointments in the general elections. It is important to note that there is nowhere any prohibition in the above statutes against such special election being held on the same date as any other special or general election, so long as the requirements regarding general elections are complied with. Nor is there any wording which would indicate an objection to using the same judges and clerks for more than one proposition or election. The only specific provision on this question is that the judges and clerks shall be selected by the same board which appoints for the general election.

To this point, then, there is no reason to prohibit, or even to suggest, that it would be improper to hold the school fund distribution election on the same date, and with the same officials, as are employed for the gasoline tax referendum.

There remains, therefore, only an examination of the general election laws as they may relate to the specific situation you describe.

January 28, 1950

The last quoted sentence of Laws of Missouri, 1947, Vol. I, page 285, Section 2, is: "Such special election shall be governed in all respects by the general election laws."

An examination of the general election laws, particularly Sections, 11499, 11501 and 11504, R. S. Mo., 1939, relating to election judges, reveals nothing that would prohibit the same persons from serving as the judges of both elections.

In a previous opinion of this office, dated February 12, 1945, addressed to the Honorable William E. Shirley, Prosecuting Attorney of Adair County, this office held that the same persons could serve as judges and clerks for two elections, both special. In that opinion, the following language appears:

"It is apparent that no conflict need arise in the conduct of the election, as both are to be held in accordance with the statutes relating to general elections * * *. We are of the opinion that an otherwise eligible person can serve as judge or clerk in both elections."

If then, the gasoline tax referendum is also to be conducted in the manner provided for by the general election laws, there would be no conflict in the conduct of these two elections and therefore they could be held on the same date and conducted by the same officials.

The resolution authorizing the gas tax referendum provides in substance:

"Pursuant to referendum petition filed on 10th of October, 1949, a special election, to be conducted pursuant to the laws and constitutional provisions of this State applicable to general elections of this State is hereby ordered and shall be held in the State of Missouri on Tuesday, the 4th day of April, 1950 submitting to the qualified voters of this State for their approval or rejection House Committee Substitute for H. B. 185 passed by the 65th General Assembly and approved by the Governor on August 27, 1949."

(Underscoring ours.)

It is therefore clear that both elections are to be governed by the same laws and thus there will be no conflict resulting from conducting both elections on the same date and by the same officials.

Hon. Roger Hibbard

January 28, 1950

CONCLUSION

It is the opinion of this office that a county may hold an election upon the proposition of making annual distribution of the capital of the liquidated school funds on the same date, and using the same election officials, as are employed in conducting the forthcoming gasoline tax referendum, provided the petitions requesting such election are filed within sixty days before said referendum.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



HJD:hr

TAXATION } Estate of decedent not liable for taxes on property devised
for charitable use, where lien had not accrued at death.

February 23, 1950

Filed 40



Honorable Craig Hiller
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I am writing to request that your office please give me your opinion as to the exemption from taxes under the following facts.

"At the time of making the 1949 tax assessment, which was January 1st, 1949 under the provisions of Section 10970 of the Statutes, as amended at page 1774 of the 1945 Session Acts; one Dr. W. F. Pauly owned and operated a Hospital here;

"He died in April, 1949 and by his Last Will and Testament devised the Hospital Building to the City of Kahoka for charitable use;

Thus the property was privately owned at the time the 1949 assessment was made, but transferred to charitable use before the 1949 taxes were payable.

"Query: Is the Estate of W. F. Pauly liable for the payment of the 1949 taxes?"

Section 4 of an act found in Laws of Missouri, 1945, page 1799, provides:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Honorable Craig Hiller

Section 7 of said act contains the following provision:

" * * * real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the state in all real property for all taxes thereon, which lien shall accrue and become a fixed encumbrance as soon as the amount of the taxes is determined by assessment and levy, and said lien shall be enforced as hereafter provided in this chapter; * * *"

(Underscoring ours.)

The third class of demands against the estate of a deceased person is defined by Section 181, R. S. Missouri, 1939, as follows:

"III. All debts, including taxes due the state or any county or incorporated city or town; and it shall be the duty of the executor or administrator to pay all such taxes without any demand therefor being presented to the court for allowance: Provided, that no executor or administrator shall pay any taxes on the real estate of the deceased that are not a charge against the same at the death of the deceased, except where he is in possession of the realty under an order of the court."

(Underscoring ours.)

Under the provisions of Section 7 of the 1945 act, quoted above, taxes do not now become a lien until the amount of taxes is determined by assessment and levy. In the present case the death of the owner occurred in April 1949, and the 1949 taxes would not have become a lien at that time, the assessor's book not being required to be corrected and adjusted until September 1st. (Laws of 1945, page 1958). Therefore, inasmuch as 1949 taxes did not constitute a charge against the property at the death of the owner, we are of the opinion that under Section 181, referred to above, the executor is not permitted to pay taxes on such property for the year 1949.

There have been cases which hold that the lien for taxes is effective from the assessment date, although the amount of the tax had not been definitely determined by assessment and levy. See Collector of Revenue v. Ford Motor Company, 158 Fed. (2d) 354. That

Honorable Craig Hiller

case was, however, decided under the provisions of Section 10941, R. S. Missouri, 1939, now repealed, which contained no provision that the lien should become a fixed encumbrance as soon as the amount of taxes had been determined. Therefore, we feel that the holding in that and similar cases is no longer applicable.

Section 4 of the 1945 act, quoted above, does provide that the person owning real property on January 1st shall be liable for taxes thereon during the same calendar year. However, courts of this state have held that liability for taxes on realty is not an obligation in the nature of a debt which may be enforced in an action for personal judgment against the owner of the property. (State ex rel. Hayes v. Snyder, 139 Mo. 549, 41 S.W. 216.)

Furthermore, the law is well settled that taxes may be recovered only in the manner provided by law. (State ex rel. Western Union Telegraph Company v. Markway, 341 Mo. 976, 110 S.W. (2d) 1018.) Inasmuch as liability for real taxes is not in the nature of a personal debt, and in view of the fact that the statute providing for allowance of claims against an estate provides only that such taxes which constituted a charge upon the land at the date of the death of the decedent should be paid by the executor, we perceive no method by which the taxes in question may be held to be a liability of the estate of the decedent.

CONCLUSION

Therefore, it is the opinion of this department that where a person owning property on January 1, 1949, dies in April 1949 and devises property owned by him to a municipal corporation for charitable use, the estate of the decedent is not liable for the payment of real property taxes for the year 1949 on said realty so devised to the city for charitable use.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

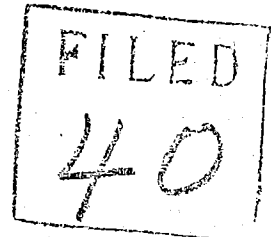
RRW/feh

COUNTY TREASURER }

County Court in third class county, not under township organization, may pay stenographic help for County Treasurer.

March 13, 1950

Filed 40



Honorable Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"May the County Court permit a Treasurer of a 3rd class County to hire stenographic help, payable out of the budget prepared and accepted for such official?"

Ray County is a county of the third class not under township organization. Examination of the statutes pertaining to the compensation and duties of county treasurers in counties of the third class, not under township organization, (Article VIII, Chapter 100, R. S. Missouri, 1939, Laws of Missouri, 1945, page 1540) reveals no provision for payment of stenographic help for the county treasurer in such counties.

In such circumstances we are of the opinion that the case of Bradford v. Phelps County, 210 S.W. (2d) 996, may be relied upon in answering your question. That case involved the allowance by the county court of Phelps County of the sum of Fifty Dollars (\$50.00) per month to the Prosecuting Attorney for stenographic hire as part of the estimated expense of his office. In the course of the opinion in that case the court stated, 210 S.W. (2d), 1. c. 1000:

"Of course, the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example,

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see Laws of Missouri, 1945, pp. 574, 578, and 583, Mo. R.S.A. Sections 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. To put it in another and summary way--since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performance of its duty under the County Budget Law would make, County Budget Law, supra, particularly Sections 10912 and 10917."

There being no provision for the payment of stenographic hire for the county treasurer in a county such as yours, we feel that the county court may allow in the county budget and pay from county funds such sum for such services as the county court in the exercise of its discretion may deem proper.

The case of Alexander v. Stoddard County, 210 S.W. (2d) 107, which involved the question of the right of the county treasurer and ex officio collector in counties of the third class, under township organization, to recover compensation paid by him to a

Honorable Wilson D. Hill

deputy is not deemed in point in the present situation. In that case the court held that the county treasurer was not entitled to recover from the county the amount of such compensation paid by him for the reason that the statute expressly provided that the deputy should be paid from the fees earned by the county treasurer. No such provision is found in this situation. We also wish to point out that this opinion deals only with stenographic hire and does not apply to deputies. Furthermore, any question of the necessity of the treasurer's employing stenographic hire is a matter to be determined by the county court.

CONCLUSION

Therefore, it is the opinion of this department that the county court of a county of the third class, not under township organization, may allow in the county budget and pay from county funds such amount for stenographic hire of the county treasurer as the county court in its discretion may deem proper.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW/teh

NEWSPAPERS: Section 14966, Senate Bill No. 123, 65th
General Assembly, has not fixed maximum to
PUBLICATIONS: be charged by newspapers for legal publi-
cations in civil cases nor does any other
statute set maximum, outside cities having
100,000 population or more.

April 12, 1950

Filed No. 40

Honorable Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Sir:

This is in answer to your letter of recent date
requesting an official opinion of this department, read-
ing as follows:

"It has been the custom and practice in
the Tenth Judicial Circuit of Missouri,
for the various newspapers publishing
legal notices in civil matters to govern
their charges to comply with the pro-
visions of Section 14966, Revised Sta-
tutes of Missouri for 1939.

"This section was revised and a new
section enacted bearing the same number
by the Legislature and will appear in
the laws of 1949.

"It was passed as Senate Bill No. 123.
The amendment provides for an increase
in the rate.

"The question has arisen in this circuit
as to whether or not this section, as
amended, covers the rates to be charged
by newspapers for publications in civil
matters such as an order of publication
in a civil suit, a notice of sheriff's
sale of real estate in partition or under
execution, or notices required to be
published by the Probate Court in Pro-
bate proceedings and other related and
similar publications where the cost is

not to be borne by the state or a county.

"If, in your opinion, this section herein-above set out, does not control the rates which may be charged for the types of publications mentioned, is there any statute or section of the laws which does cover the same or may each newspaper charge whatever rate they deem fair and reasonable."

Section 14966, Senate Bill No. 123, 65th General Assembly, provides as follows:

"When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county, or for any public officer on account of, or in the name of any county, there shall not be charged by or allowed to any such newspaper for such publications a higher rate than ten cents per line for each insertion, the lines to be two inches long and to be set in type occupying twelve lines to the column inch, fractional lines to be charged and paid for as one line: Provided, however, that where any law authorizing and requiring the publication of any such law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice, shall require the use of a type having a body larger than six point, or more than one size of type, or the use of any emblem, or the spacing of lines so as to have a blank space between the lines, said printing shall be paid for by the inch of space used, single column of 12 ems pica wide, which price per inch shall not exceed the rate of one dollar per inch, single column of 12 ems pica wide, for

each insertion. When any law proclamation, advertisement, nominations to office, proposed constitutional amendments, or other questions to be submitted to the people, order or notice, shall be required by law to be published in any newspaper, the rates herein specified shall prevail, and all laws or parts of laws in conflict herewith, except sections 14970 and 14972, Revised Statutes 1939, and Section 14971, laws of 1945, pages 1318 and 1319, approved July 3, 1946, are hereby repealed. Reenacted, Laws 1949, p. , S.B.No. 123, Sec. 1." (Emphasis ours.)

Obviously Section 14966, supra, limits the maximum amount that may be charged by a newspaper for publications only when such publications are for the state or the county or for a public officer on account of or in the name of the state or county. The publications required in civil suits between private litigants are not such publications as come within the provisions of Section 14966.

Section 14970, Revised Statutes of Missouri, 1939, provides as follows:

"In all cities of this State which now have, or shall hereafter have, a population of one hundred thousand inhabitants or more, all public notices and advertisements, directed by any court or required by law to be published in a newspaper, shall be published in some daily newspaper of such city, of general circulation therein, which shall have been established and continuously published as such for a period of at least three consecutive years next prior to the publication of any such notice. R.S.1929, Sec. 13777; as amended Laws 1941, p. 519, Sec. 1."

Section 14971, Laws of Missouri, 1945, page 1317, provides as follows:

"In all such cities a board consisting of the judges of the circuit court of such city or of the judicial circuit in which

said city is situated, or a majority of them shall on or before the first day of January, 1942, and every two years thereafter, cause to be published in some daily newspaper of said city a notice for at least twenty days announcing and designating the time and place when and where said board shall hold a hearing to determine what newspapers in such cities are qualified to publish public notices and advertisements under the provisions of the preceding section; and all newspapers in said cities desiring to publish such public notices and advertisements shall, on or prior to the date of each such hearing, file with the board a petition verified by the affidavit of one of the publishers thereof, that such newspaper has the qualifications set forth in the previous section and desires to be designated as a qualified newspaper under the provisions of the preceding section, and a majority of the board at such time and place shall determine what newspapers so petitioning are qualified under the provisions of the preceding section and shall make a record thereof and shall file a copy thereof with the clerk of all courts of record within such cities, and thereupon such newspapers shall be deemed and considered by all courts and officers of this state to be qualified under the provisions of the preceding section; Provided, however, that there shall not be charged by or allowed to any such newspaper for such publications a higher rate than fifteen cents per line for each insertion, the lines to be two inches long and to be set in type occupying twelve lines to the column inch, fractional lines to be charged and paid for as one line; Provided, however, that said petition shall be accompanied by a good and sufficient bond, in a sum to be fixed by said board, conditioned for the correct and faithful publication in said newspaper of all said public notices and advertisements, in manner and form as required by law, and at rates not in excess of

April 12, 1950

the rate fixed herein; Provided, further, that the board of judges of any such city, if the board shall deem it in the public interest, shall, in the manner hereinbefore prescribed, qualify any daily newspaper of general circulation for the publication of public notices and advertisements at rates higher than the maximum rates herein established, though such newspaper shall not file bond hereunder."

It is to be noted that Section 14970 and Section 14971, supra, are not limited to publications by or for the county or state as was the case in Section 14966, but apply to all publications directed by any court or required by law to be published in a newspaper.

We are unable to find any other statute than Section 14970 and Section 14971, supra, setting a maximum charge by newspapers for publications in civil cases between private litigants.

Conclusion

It is the opinion of this department that Section 14966, Senate Bill No. 123, of the 65th General Assembly, is not applicable to publications in newspapers in civil cases between private litigants.

It is further the opinion of this department that except in cities of 100,000 and over there is no maximum set for charges by newspapers for legal publications required in civil cases between private litigants.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General

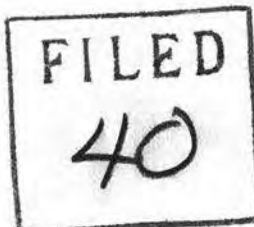
MAGISTRATES

) Where population of county falls below 30,000
) according to preliminary census figures,
) separate office of magistrate abolished as of
) January 1, 1951. No districting in such county
) for purpose of election ~~on~~ appointment of
) additional magistrate.

November 30, 1950

12/5/50

Honorable Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Numerous questions have arisen in Marion County concerning our Magistrate Court in view of the recent 1950 decennial census.

"We have heretofore been classed as a County of the third class with the population in excess of thirty thousand inhabitants and, as such, we have had for the past four years a separate Magistrate, by that I mean that the Probate Judge has not been the ex-officio Magistrate.

"We have reason to believe, although we have no official knowledge thereof, that our County has fallen below the thirty thousand inhabitants in the 1950 decennial census. That being true, we respectfully request an opinion from your office concerning the following points.

"1. Assume that there is no official publication made of the population of Marion County under the 1950 decennial census before the general election in November; that a Magistrate is elected

Honorable Roger Hibbard

for a term of four years beginning January 1st, 1951; that after the November election and before January 1st, the 1950 decennial census is officially published and Marion County falls below thirty thousand population.

"Question. Would the Magistrate elected at the November election take office and serve for a term of four years or would the office thereby automatically be abolished?

"2. Assume the facts to be as in number one except that there is no official publication of the 1950 decennial census showing Marion County below thirty thousand population, until after January 1st.

"Question. (a) Would the Magistrate elected at the November election take office on January 1st? (b) If he did take office would his term continue for a full term of four years or would the office be abolished on the date of the publication of the census after January 1st?

"3. If Marion County falls below the thirty thousand population and we have a Probate Judge as ex-officio Magistrate and the Circuit Court under the provisions of Section One, Page 767, Laws of 1945, 'according to the needs of Justice' finds an additional Magistrate is required for the County.

"Question. Is it mandatory on the County Court to district the County under the provisions of Section Four, page 768, Laws of 1945, or could such additional magistrate have concurrent jurisdiction with the other Magistrate over the entire County?

"We respectfully request opinion from your office concerning these matters which we deem to be of vital importance to the judicial structure of this County."

Honorable Roger Hibbard

Section 18 of Article V, Constitution of Missouri, 1945, provides:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates, and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice. The salaries of magistrates shall be paid from the source or sources prescribed by law."

Section 462.01 of Senate Bill No. 1144, Sixty-fifth General Assembly, provides:

"Magistrates, as herein provided for, shall be elected at the general election to be held in 1946, and every four years thereafter, and shall hold their offices for four years, or until their successors are elected or appointed, commissioned and qualified. In counties of 30,000 inhabitants or less the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice, the foregoing number of magistrates in any county may be increased

Honorable Roger Hibbard

by not more than two, or such increased number may be decreased, by order of the circuit court, on petition of five hundred qualified voters of the county, and after hearing on public notice to be published in some newspaper of general circulation in the county once each week for three consecutive weeks immediately preceding said hearing. No petition for additional magistrate shall be granted unless the circuit court finds from the evidence heard that the administration of justice requires that the number of magistrates be increased, and that the need for additional magistrate or magistrates is not temporary but appears to the circuit court that a permanent need exists. Such additional magistrates shall be appointed by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

Section 1.10 of Senate Bill No. 1001, Sixty-fifth General Assembly, provides:

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1, of each tenth year after 1951."

Honorable Roger Hibbard

In your opinion request you asked that we assume that there is no official publication of census figures before the November election and before January 1, 1950. However, there has been official publication of preliminary census figures by the Director of the Census. On November 5, 1950, he issued Bulletin No. 4 of Series PC-3 setting forth preliminary population by counties of all states including Missouri. This report shows the population of Marion County by the preliminary count to be 29,736. The bulletin explains that it does not give the final verified population totals as the final totals may differ from the preliminary counts because of the allocation to the place of usual residence of persons who were enumerated elsewhere and because of other revisions.

Inasmuch as there has been an official publication of the population of your county, we think that consideration should first be given to the effect of such publication. If the figures contained in the preliminary report are to be accepted, there is no need for further speculation as to what might have been the situation in the absence of any publication.

In the case of *Garrett v. Anderson*, 144 S.W. (2d) 971, the Texas Court of Civil Appeals had under consideration the determination of population of a county of that state. In the course of its opinion the court stated, 144 S.W. (2d) 1. c. 972:

"The federal statutes provide no formula or procedure for the promulgation of reports of the population ascertained by the taking of any census. The nearest approach to such procedure is found in 13 U.S.C.A. Sections 4 and 213, in which it is provided that, 'The Director of the Census is authorized and directed to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law; * * *.' (Section 4.) 'The Director of the Census is hereby authorized * * * to have printed by the Public Printer, in such editions as the director may deem necessary,

Honorable Roger Hibbard

preliminary and other census bulletins,
* * * and to publish and distribute said
bulletins and reports.' (Section 213.)

"The record in this case does not embrace any report or statement purporting to emanate directly from the 'Director of the Census,' but the Hon. Ben S. Morris, duly accredited supervisor of the census for the Twentieth District, consisting of Bexar County, issued and delivered to the County Judge the following preliminary report of the census for said County.

"Form P 114 (1940 and 1930)
'Department of Commerce
'Bureau of the Census
'Sixteenth Census of the United States
'Office of Supervisor of Census
'821 Frost Bank Building
'San Antonio, Texas,
'June 25, 1940
'Released for Immediate Use

"Sixteenth Census--Preliminary Announcement of Population
(Subject to Correction)

"The population of County of Bexar, State of Texas, as shown by a preliminary count of the returns of the Sixteenth Census, taken as of April 1, 1940, is 337,557, as compared with 292,533 on April 1, 1930. The 1940 figures are preliminary and subject to correction.

'Ben S. Morris
'Supervisor of Census.'

"No question is made of Supervisor Morris' authority to execute and promulgate the 'preliminary announcement of population' of Bexar County, nor is there any contention that the figures in his report to the County Judge are substantially inaccurate, or so far from the true number

Honorable Roger Hibbard

as to affect the question presented here. The report purports (without question of its authenticity) to be upon forms furnished the Supervisor by the Census Bureau, apparently under authority provided in Sections 4 and 213 of the Census Act, supra. Like reports, or 'preliminary announcements,' of the census of the City of San Antonio and of Bexar County, were furnished on this form by Supervisor Morris to the Mayor and Chamber of Commerce, as well as the County Judge, in accordance with the policy of the Bureau. It should be presumed from the record here that Mr. Morris was acting fully within his official authority as supervisor in issuing the report for the benefit of the public.

"We are of the opinion, therefore, and here hold as a matter of law, under the record made here, that the report of Supervisor Morris amounted to an official announcement, in behalf of the federal government, that the population of Bexar County, according to the last preceding federal census, is 337,557, subject to such necessary slight and here immaterial corrections as may be made in the final figures promulgated by the appropriate authority in the National Government. It follows from this conclusion that the County officials of Bexar County were authorized to take official notice of that report as a declaration of the 'last preceding * * * Federal Census' as contemplated in Article 2326e, and, accordingly, to discontinue payment of the salaries prescribed in that statute for court reporters in counties having a population of not less than 290,000 and not more than 325,000. The trial court therefore did not err in refusing to issue any writs requiring the county officials to authorize and make payment of such salaries. * * *

Honorable Roger Hibbard

As pointed out in the above case, Section 213 of Title 13, U.S.C.A., authorizes the Director of the Census to publish preliminary census bulletins. As further pointed out Federal Statutes make no provision for procedure for official promulgation of population figures. Such being the case and under the provisions of Section 1.10 of Senate Bill No. 1001, fixing the effective date of the 1950 census as of January 1, 1951, we are of the opinion that in view of the holding of the above-cited case, the preliminary figures published by the Director of the Census should be relied upon in the absence of any final report in determining population for the purposes of Senate Bill No. 1001.

Holding this view, the population of Marion County "for the purpose of representation or other matters" as of January 1, 1951, will be 29,736. Under the provisions of Section 5, Laws of Missouri, 1945, page 765, a person elected at the November 7, 1950, election would have entered upon the discharge of his duties as magistrate on January 1, 1951. However, under the provisions of Section 18 of Article V of the Constitution there would be no office to be filled on that date inasmuch as the population of the county is less than 30,000 inhabitants.

As for your third question, we point out that the division of a county having more than one magistrate into magistrate districts does not affect the territorial jurisdiction of the magistrate courts. Section 19 of Article V, Constitution of Missouri, 1945, provides:

"After each census of the United States the boards of election commissioners, or if none, the county courts, shall divide counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate shall be elected. Each of such magistrates shall have jurisdiction coextensive with the county, and the magistrates may organize into a court or courts with divisions."

(Underscoring ours.)

Section 4, Laws of Missouri, 1945, page 765, provides in part:

Honorable Roger Hibbard

"The election of magistrates shall in all respects be conducted as other elections and the returns made as for other officers. In counties where under the last preceding decennial census of the United States or by order of the circuit court as provided by law, they are entitled to more than one magistrate, the board or boards of election commissioners, or if none, the county court, shall on or before April 1, 1946, and thereafter within 60 days after such board or boards, or if none, the county court, shall be officially informed that the duty has arisen for them to divide such county into magistrate districts, divide such counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate will be elected, who shall be a resident of the district in which he is elected. When the number of magistrates in any county has been increased or decreased by order of the circuit court as provided by law, the board or boards of election commissioners, or if none, the county court, shall within 60 days thereafter redistrict said county into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate will be elected. * * *"

Thus, the division of the county into districts is only for the purpose of election when there is more than one magistrate in the county. We are of the opinion, however, that such districting would not be required in your county on the abolition of the separate office of magistrate followed by the appointment of an additional magistrate in accordance with the constitution and statutes. You will note that the constitutional and statutory provisions require districting only in "counties having more than one magistrate." Under Section 18 of Article V, Constitution of Missouri, 1945, a county having a population of less than 30,000 inhabitants does not have a magistrate. The probate judge is judge of the magistrate court. Therefore, on the appointment of a magistrate in your county pursuant to order of the circuit court, your county would have only one magistrate, although it would have two judges of the magistrate

Honorable Roger Hibbard

court: the probate judge and the magistrate. Each would, under the provisions of Section 19 of Article V, quoted above, have jurisdiction coextensive with the county, but there would be no districting for the purpose of election.

CONCLUSION

Therefore, this department is of the opinion that in the absence of the final census report when the preliminary population figures released by the census bureau for the 1950 decennial census show that the population of a county, which has previously had a population in excess of 30,000 inhabitants, has fallen below 30,000 inhabitants, the separate office of judge of the magistrate court is abolished as of January 1, 1951, and the judge of the probate court thereupon becomes judge of the magistrate court in such county.

If, in such county, an additional magistrate is provided after January 1, 1951, such additional magistrate and the judge of the probate court would have magistrate jurisdiction coextensive with the county. Upon the appointment of such additional magistrate, the county would not be required to be divided into magistrate districts, inasmuch as the county would have only one magistrate.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW/feh

CONTRACT:

STATUTE OF FRAUDS:

Contract for the sale of Goods, Wares and Merchandise for the price of \$30.00 or more, not valid unless the parties thereto comply with the provision of the Statute of Frauds, (Sec. 3355 R. S. Mo. 1939)

November 30, 1950

Honorable C. H. Hill
Superintendent of Industries
Missouri State Penitentiary
Jefferson City, Missouri

12/1/50
FILED

40

Dear Mr. Hill:

Your letters of recent date requesting an opinion of this office reads as follows:

LETTER NO. I

"This confirms our phone conversation of this morning, November 4, 1950 relative to the twine contract between Henry F. Byrne, Superintendent of Industries and James A. Flanagan, Jr., Special Problem Engineer, Yacht Mayme, 1300 Maine Avenue, South West, Washington, D. C. for 400 metric tons of first quality sisal binder twine.

"This twine has been manufactured and has been in our warehouse since 1947. For the past nine months, I'd say on eight occasions we have asked Mr. Flanagan for shipping instructions and tags so as to ship this twine out of our warehouse as per contract. Up to now we have been unable to get shipping instructions or tags to execute same. With the same taken there was no down payment or contract secured by Mr. Byrne from Mr. Flanagan for this large sum of merchandise and money.

"We now feel we cannot hold this twine any longer and are therefore asking you if it would be permissible to cancel this contract with Mr. Flanagan.

"Please return the enclosed contract and letters with your reply. Thank you kindly."

Hon. C. H. Hill

LETTER NO. II

"Have your letter of November 21, 1950 - subject binder twine. All of the information relative to the 500 metric tons binder string for Mr. James A. Flanagan, Jr. was the telegram and all correspondence referring to that order accompanied our original letter to Mr. Waldo P. Johnson. This is all the information we had concerning the above order.

"We notified Mr. Flanagan this week by a registered letter cancelling his order for 500 metric tons binder string. A copy of this letter is attached.

"When you are through with the correspondence concerning this order please return to this office. Thanks very much."

In the case of Pratt v. Miller, 109 Mo. 78, 1. c. 81-82, 84 and 90, our Court in a similar case said:

"Plaintiffs' cause of action set out in the petition is: That the defendants ordered and requested plaintiffs to manufacture for and furnish to them divers goods, wares and merchandise, being boots and shoes, of which an itemized account, the price amounting to \$265.45, is filed; that plaintiffs accepted said order, manufactured said goods, shipped and tendered them to defendants, who refused to pay for them. The defendants' answer was a denial of the material allegations of the petition, a plea of the statute of frauds; a warranty of quality and breach thereof.

"The question to be determined in this case is, whether the contract in question is a contract for the sale of goods, wares and merchandise, or a contract for work and labor to be done and materials to be furnished. If the former, it is within the statute, and the plaintiffs cannot recover. If the latter, it is not within the statute, and they may. The Kansas City court of appeals,

in effect, held that the contract belonged to the latter class and was not within the statute, without discussing the question, but simply citing Browne on the Statute of Frauds, section 308 (a), in support of its conclusion.

* * * * *

* * * * *

"* * * * * The undisputed facts in this case show that this contract was a sale of goods, wares and merchandise within the meaning of the statute, and not being in writing the demurrer to the evidence ought to have been sustained."

The statute under which the above case was brought about (Section 2514, R. S. Mo. 1879) is the same as the statute of today, Section 3355, R. S. Mo. 1939, and reads as follows:

"No contract for the sale of goods, wares and merchandise for the price of thirty dollars or upward, shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized."

Purchase of this amount of merchandise brings it within Section 3355, supra, and in the case of Delventhal et al. v. Jones, 53 Mo. 460, 1. o. 462 and 463 the Supreme Court said that in order to be bound on such a contract the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain and signed by the parties to be charged with such contract, or agents lawfully authorized; and unless one or more of these acts are performed and complied with, then the contract of sale is void.

Hon. C. H. Hill

From the communications received from Mr. James A. Flanagan, Jr., and from your letters asking for an opinion we are unable to find wherein any one or more of the requirements set out in Section 3355, supra, have been complied with and we are unable to find wherein, the Missouri State Twine Company would be bound on an offer of purchase and wherein they would be prevented from disposing of the stock or binder twine manufactured in compliance with such order when the parties had not complied with the requirements of the statute above quoted.


CONCLUSION

It is, therefore, the opinion of this department that the Missouri State Twine Company is at liberty to disregard the so-called purchase contract for 500 metric tons of first quality sisal binder twine ordered by James A. Flanagan, Jr., Special Problem Engineer, Washington, D. C., and to dispose of whatever stock they have on hand which was manufactured in compliance with the order.

Respectfully submitted

GORDON F. WEIR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
ATTORNEY GENERAL

GPW:A

COUNTY COLLECTORS) Current drainage taxes included in determining
) compensation for mailing notice of taxes due.

April 25, 1950



Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Please furnish this department with an official opinion on the following question:

"Does the compensation allowed collectors of revenue in third and fourth class counties, under the provisions of House Bills 56 and 57, passed by the 65th General Assembly, include the collection of current drainage taxes?"

House Bill No. 56 of the Sixty-fifth General Assembly contains the following provisions:

"Section 1. Beginning with the calendar year 1949, and each year thereafter, collectors of revenue in all third class counties of the state, not under township organization, shall mail to all resident taxpayers, at least fifteen days prior to delinquent date thereof, a statement of all real and tangible personal property taxes due and which are assessed on the current tax books in the name of such taxpayers. Collectors shall also mail tax receipts for all such taxes received by mail.

"Section 2. The said statement and receipt shall be mailed to the address of the taxpayer as shown by the county assessor on

Honorable W. H. Holmes

the current tax books, and postage for the mailing of said statements and receipts shall be furnished by the county court; provided, however, that the failure of the taxpayer to receive the notice provided for in this act shall in no case relieve the taxpayer of any tax liability imposed on him by law.

"Section 3. The collectors in third class counties shall receive one-half of one per cent of all current taxes collected, including current delinquent taxes, exclusive of all current railroad and utility taxes collected, as compensation for mailing said statements and receipts. Said compensation shall be exclusive of and unaccountable in the maximum commissions now provided in Sections 11106 and 11107, Revised Statutes of Missouri, 1939."

House Bill No. 57 of the Sixty-fifth General Assembly is identical with House Bill No. 56, except for the fact that it is applicable to fourth class counties.

The County Collector is required by law to collect drainage district taxes. Section 12342, R. S. Missouri, 1939. (Dalton v. Fabius River Drainage District, 238 Mo. App. 655, 184 S.W. (2d) 776.)

In both House Bill No. 56 and House Bill No. 57 provision is made that the collector's compensation shall be based on all current taxes collected, "exclusive of all current railroad and utility taxes collected." Applying the maxim, *expressio unius est exclusio alterius*, we feel that inasmuch as the Legislature has expressly provided that the railroad and utility tax should not be included in determining the compensation of the collector, all other current taxes, including drainage taxes, should be included.

CONCLUSION

Therefore, it is the opinion of this department that in determining the compensation of the County Collector under House

Honorable W. H. Holmes

Bill No. 56 and House Bill No. 57, Sixty-fifth General Assembly,
current drainage taxes are to be included.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

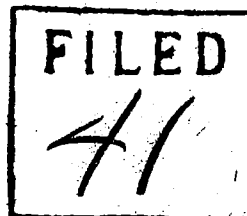
J. E. TAYLOR
Attorney General



RRW/feh

SCHOOLS) Levy applicable when election approving excess is
TAXATION) declared void is maximum permitted under constitution
without election. Taxpayers who tender legal tax not
liable for penalty.

May 16, 1950



Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department,
which request is as follows:

"Please furnish this department with an
official opinion based on the following
statement of facts:

"A special election was held on June 30,
1948, by School District No. 72 in Mer-
cer County. At that time a levy of \$2.00
was voted, which is \$1.35 in excess of
the regular levy of \$.65. The \$2.00 levy
has been held by the Kansas City Court of
Appeals to be null and void, because the
election was illegally held.

"Certain taxpayers did not pay any of the
1948 tax; however, they offered to pay to
the township collector, while the taxes
were current, all of the tax except the
school tax, which the township collector
would not accept. Due to this fact the
delinquent taxpayers contend that they
should not be charged with penalties.

"The questions are:

"(1) In as much as the \$2.00 levy has been
held to be illegal, what school tax, if any,
should be collected from the taxpayers?

Honorable W. H. Holmes

"(2) Are the taxpayers liable for the penalties provided by law for delinquent taxes?"

Section 10358, Laws of 1945, page 1629, provides:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the School Board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by Section 10418; and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

Honorable W. H. Holmes

Section 11(b) of Article X, Constitution of Missouri, 1945, limits the rate of taxation in school districts, such as that here involved, to sixty-five cents on the hundred dollars assessed valuation in the absence of approval by the voters.

Inasmuch as the election to approve the increased rate was void, the status of certification of the rate to the county clerk is the same as if no election had been held. In the case of Kansas City, Fort Scott & Memphis Railroad Company v. Chapin, 162 Mo. 409, the question of application of a rate in excess of that authorized without approval of the voters was considered. The court in its opinion stated (162 Mo., 1. c. 415):

"The estimates which the school board are required to forward to the county clerk by section 9771, (Section 10347, R.S. Mo. 1939) certified by the district clerk, in case of an increase, by vote of the taxpayers of the annual rate, beyond forty cents, as required by Section 9777, (Section 10358, R.S. Mo. 1939) are the only authority given by law to the county clerk to 'assess and carry out' such increase as a tax on the property of the citizen. Without such authority he had no power to thus levy such increase as a tax upon defendant's property as was done in the districts mentioned. To that extent these school taxes were excessive, without authority of law, and void, and the defendant should have been relieved to the extent of such excess."

(Underscoring ours.)

Such rule should, we feel, be applicable in this situation. The attempted increase having been declared void, the only school tax which should be permitted to stand is the limit which might have been levied without voter approval, and which in this case is sixty-five cents on the hundred dollars assessed valuation.

As for your second question, the law is well settled that the collector may not accept only a portion of taxes owed by a taxpayer. In the case of State ex rel. Stone v. Kansas City, Fort Worth & Memphis Railroad Company, 178 S.W. 444, the court stated:

" * * * We know of no law requiring the collector to accept a part of the taxes under the circumstances of this case. The collector's

Honorable W. H. Holmes

refusal to accept the amount tendered did not result in relieving defendant of the payment of the penalty on the amount tendered."

Inasmuch as under the laws of this state, the collector may not accept a portion of taxes due, we feel that, insofar as the matter of penalty is concerned, the rule applicable is that, the taxpayer having had no opportunity to pay the portion of the tax which he conceded to be due, the penalty will not attach. In the case of Redwood County v. Winona and St. Paul Land Company, 40 Minn. 515, 42 N. W. 473, the court held that where part of a tax was illegal and the taxpayer had no opportunity to pay the legal part alone and successfully defended against the illegal part, no penalty for any part of the tax should be imposed upon it. The court held that the penalty for non-payment of the tax could not be imposed until the person has had an opportunity to pay the tax and failed to do so.

Under the circumstances of this case the taxpayers having tendered the amount legally due and the collector having been unable under the law to accept that amount, we are of the opinion that the penalty should not attach.

CONCLUSION

Therefore, it is the opinion of this department that when a levy is voted by a school district in excess of the constitutional limit, and the election approving the levy is subsequently held void, school tax should be collected at the maximum rate permitted in the district under Section 11(b), Article X, Constitution of Missouri, 1945, which, in the case of school districts not formed of cities and towns, is sixty-five cents on the hundred dollars assessed valuation.

We are further of the opinion that taxpayers who tendered to the township collector while the taxes were current all of the tax except the school tax which the township collector would not and could not accept are not liable for penalties on the taxes so tendered where the levy for the school tax has been declared illegal and void.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General

RRW/feh

SCHOOLS) Notice of special election in common school district
ELECTIONS) entitled "special school meeting" instead of "special
school election," and concluding election within one
hour after opening of special school meeting, are mere
irregularities and will not justify the State Auditor
in refusing to register bonds voted at such election
under Section 3306, R. S. Missouri, 1939.

June 28, 1950

7/1/50



Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which is as follows:

"Recently there was submitted to this Office for registration 10 Bonds aggregating the sum of \$11,875.00, issued by the Sherwood School District No. 87, Greene County, Missouri, dated June 1, 1950. We understand a copy of the transcript relating to this issue is now in your Office.

"We refused to register the above described bonds and they were returned to Mr. Clarence E. Billings, a member of Sherwood School Board on June 17, 1950, for the following reasons quoted from our letter to Mr. Billings:

"1. Your notice was for a 'Special School Meeting' whereas, it should have been for a 'Special School Election.'

"2. Your special school meeting was convened at 2:00 P.M. and according to the transcript it continued until the hour of 3 o'clock. We are of the opinion that one hour was not a reasonable length of time, within the meaning of the law, for an election such as this.

"We wish to have an opinion from your Office as to whether or not our action in the above matter was justified according to the proceedings as shown in the transcript."

A transcript of the proceedings authorizing the bond issue in question has been made available to this office as we review

Honorable W. H. Holmes

your action in refusing to register the bonds under the provisions of Article 6, Chapter 16, R. S. Missouri, 1939. Your refusal to register the bonds under consideration is based solely on the two following alleged deficiencies:

- (a) that the notice calling for the election was entitled "special school meeting," whereas you contend that it was mandatory for the notice to be entitled "special school election"; and
- (b) that the special school meeting was convened at 2:00 p.m. and continued only to the hour of 3:00 p.m. on the day appointed for the election.

The subject school district, Sherwood School District No. 87, Greene County, Missouri, is a common school district governed specifically by the provisions of Article 3, Chapter 72, R. S. Missouri, 1939, and generally amenable to the general school law found at Article 2, Chapter 72, R. S. Missouri, 1939.

Section 3306, Article 6, Chapter 16, R. S. Missouri, 1939, provides as follows:

"Before any bond, hereafter issued by any county, township, city, town, village or school district or special road district or by virtue of the provisions of articles 1, 3, 6, 7 and 8, Chap. 79, R. S. 1939, for any purpose whatever, shall obtain validity or be negotiated, such bonds shall first be presented to the state auditor, who shall register the same in a book or books, provided for that purpose, in the same manner as state bonds are now registered, and who shall certify by endorsement of such bond that all conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract, under which they were ordered to be issued, have also been complied with and the evidence of that fact shall be filed and preserved by the auditor. Such bonds after receiving the

Honorable W. H. Holmes

said certificate of the auditor as herein provided, shall thereafter be held, in every action, suit or proceeding in which their validity is, or may be, brought into question, prima facie, valid and binding obligations, and in every action brought to enforce collection of such bond, the certificate of such auditor, or a duly certified copy thereof, shall be admitted and received in evidence of the validity of such bonds, together with the coupons thereto attached: Provided, the only defense which can be offered against the validity of such bonds shall be for forgery or fraud. But this section shall not be construed to give validity to any such bonds as may be issued in excess of the limit fixed by the Constitution, or contrary to its provisions, but all such bonds shall, to the extent of such excess, be held void; and provided further, that the remedy of injunction shall also lie at the instance of any taxpayer of the respective city, town, village, township or school district to prevent the registration of any bonds, alleged to be illegally issued or funded under any of the provisions of this article."

In the case of Arkansas-Missouri Power Corp. v. City of Potosi, 196 S.W. (2d) 152, 355 Mo. 356, decided by the Supreme Court of Missouri in 1946, the plaintiffs sought to enjoin the issuance, registration, and purchase of general obligation bonds of the City of Potosi, Missouri, the object of said bond issue being the erection or purchase of an electric light plant. The plaintiffs contended that they could maintain their suit under the provisions of Section 3306, R. S. Missouri, 1939, Article 6 of Chapter 16, on "registration of bonds," and providing, in part, that interested taxpayers may by injunction "prevent the registration of any bonds, alleged to be illegally issued or founded under any of the provisions of this article." In ruling against plaintiffs' contention, the court spoke as follows at 355 Mo. 1. c. 361:

" * * * This provision has been on the statutes of this State as far back as 1889. See R. S.

Honorable W. H. Holmes

1889, sec. 847. Plaintiffs do not direct our attention to any instance wherein it has been applied to issues similar to those now presented. We think, as stated upon an analogous issue in *State ex rel. v. Waltner* (Banc), 340 Mo. 137, 144, 100 S.W. 2nd 272, 276, that the Missouri cases are and the understanding of the bench and bar of this State is that the financing arrangements of Missouri counties, cities and other political subdivisions cannot be interrupted by proceedings in equity enjoining the issuance of bonds upon a challenge of the vote by which they were authorized. The statutes invoked refer only to the regularity of the proceedings underlying the bonds, and to the constitutional limitations upon such indebtedness."

No provision contained in Section 3306, R. S. Missouri, 1939, authorizes the State Auditor to refuse registration of bonds solely on the ground of some irregularity occurring in the bond election. It is true that the Auditor certifies, by endorsement on the bond issue, that all conditions of the laws have been complied with in their issue, if that be the case; but since the State Auditor is not vested with judicial power in any degree, his review touching an irregularity of the proceedings underlying the bond issue should be carefully circumscribed by constitutional and statutory provisions which set out the steps to be taken in effecting a legal bond issue. Your refusal to register the bonds in this instance is not based on any charge that a mandatory provision of any particular statute or constitutional provision has not been complied with.

In the instant case the notice calling for the election clearly stated the purpose of the meeting, and the fact that the word "meeting" was used instead of the word "election" could not have mislead reasonable minds. In *Peter v. Kaufmann*, 38 S.W. (2d) 1062, 327 Mo. 915, 1.c. 923, the following is stated relative to sufficiency of notices:

"It is these notices which the voters see and consult in order to determine what propositions are to be voted on and decided at the annual meeting, and if the notices impart intelligent information as to this, that is all that is required."

Honorable W. H. Holmes

Section 10418 and 10419, R. S. Missouri, 1939, contained in the law applicable to common schools, refer to the annual meeting of such school districts. Such meetings correspond to annual school elections of larger school districts. Section 10328, R. S. Missouri, 1939, contained in the general school law, authorizes a school board to borrow money and issue bonds for the purposes of erecting schoolhouses and buying school sites. The statute further provides that "the question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose." The use of the word "meeting" when calling for an annual meeting or a special election is no innovation on the law applicable to common schools, but is the proper method of referring to an annual election or a special election to be conducted in a common school district.

The public notice calling the special school meeting in this instance conformed to that set out under section 10418, R. S. Missouri, 1939, of the law applicable to common school districts insofar as it designated the specific time when the meeting would convene, to-wit, 2:00 p.m. of the designated election day. The statute just referred to does not set out a specific time for closing the meeting convened by notice given thereunder, nor do we find any statutory direction in this matter. Voters within the common school district were duly notified of the time of the election meeting. In this instance 26 votes were cast for the loan and 13 votes against it. There is nothing in the record to indicate that anyone who desired to vote was restrained from voting by reason of closing the meeting at 3:00 p.m., the time when the election officials deemed it proper to close the meeting. To rule that the meeting was not continued for a reasonable length of time is to allow the State Auditor to implement the statute by a rule of his own choice. Invoking such a rule is tantamount to charging that the election was tainted by fraud. In the case of State ex rel. Buckley et al. v. Thompson, 322 Mo. 248, 19 S.W. (2d) 714, the State Auditor successfully resisted the claim that he should register certain school district bonds, but in that case his refusal to register and certify the bonds was based on his contention that the school district was not a consolidated school district, and that it had no power to issue said bonds because of the invalidity of the organization of said school district. Such a situation is not analogous to the situation at hand. In the Thompson case, cited supra, we find the State Auditor refusing to register the bonds for reasons affecting the regularity of the proceedings underlying the bonds and the right and power of the school district to incur such indebtedness. In this case the State Auditor relies solely on irregularities which do not in themselves contravene any applicable statute.

Honorable W. H. Holmes

CONCLUSION

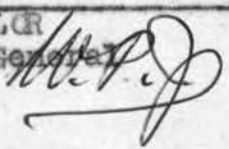
It is the opinion of this department that the State Auditor has exceeded his authority under Section 3306, R. S. Missouri, 1939, in refusing to register bonds issued by Sherwood District No. 87 of Greene County, Missouri, a common school district, such bonds being authorized at an election held on May 4, 1950, on the sole grounds that (a) the notice calling for the election was denominated a "special school meeting" instead of being denominated a "special school election"; and (b) that a reasonable time was not allowed for voters to attend and cast their ballots at the meeting which was convened at 2:00 p.m. on the date of the election and was concluded one hour later at 3:00 p.m., such contentions disclosing only irregularities and not affecting the regularity of the proceedings underlying the bonds or touching the right and authority of the school district to incur such indebtedness.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General



JLO'M/feh

PROSECUTING ATTORNEYS:

Prosecuting attorneys of third class counties to receive that compensation provided by Sections 12939, 9701 and H. B. #297 as payment in full; ~~not~~ *not* entitled to any ~~part~~ of fees collected.

July 7, 1950

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri



Dear Mr. Holmes:

This is to acknowledge receipt of your recent letter requesting a legal opinion of this department, which letter reads as follows:

"This department requests an official opinion on the following matter:

"It comes to our attention that some prosecuting attorneys in third class counties are receiving compensation from their county courts for services performed under H. B. 297, Laws of Missouri, 1949, in the sum of twenty-five per cent of the annual salaries permitted under House Bills 741 and 776, Laws of Missouri, 1945, plus twenty-five per cent of their fee collections under Section 13405, R. S. Mo., 1939.

"Our question is whether or not they would be entitled to receive back from the county, or to withhold, any part of their earnings under Section 13405 as compensation under H. B. 297?"

Section 1, Laws of Missouri, 1945, p. 1536, provides that the prosecuting attorney in counties of the third class shall receive for his services per annum a designated sum, ranging from \$1000 in counties having a population of 7,500 to \$3000 in those counties having a population of 30,000.

In addition to the compensation provided by this section, the prosecuting attorney is entitled to receive an amount equal to twenty-five per cent of such compensation for services rendered by him in the juvenile court of his county, as provided by Section 9701, Mo. R.S.A. 1939, which section reads as follows:

"When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected or delinquent child, the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition in writing, setting forth the facts and verified by his affidavit. It shall be sufficient that that affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately thereafter to fully investigate all the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment, and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. The prosecuting attorney shall receive as compensation for the additional services and duties required under this law, in addition to the salary and fees now allowed prosecuting attorneys by law, an amount equal to 25 % of the annual salary of such prosecuting attorney, per annum, to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose: Provided, however, that this section shall be applicable only to counties of the third and fourth classes."

Under the provisions of House Bill 297, Laws of Missouri, 1949, the prosecuting attorney in a third or fourth class county shall receive additional compensation for his attendance and investigation made in connection with coroners inquest held in his county. Said Bill reads in part as follows:

"The prosecuting attorney in counties of the third and fourth class is hereby required to attend inquests by coroners in cases of death occurring by violence, and which may result in a charge of felony, and said prosecuting or circuit attorney shall make an investigation concerning said death and cause to be brought before the coroner any witnesses he may desire and shall be permitted by the coroner to assist in the interrogation of witnesses for the full development of the circumstances leading up to and resulting in said death, and for his information concerning any possible criminal charge that may grow out of the same. Prosecuting attorneys shall receive as compensation

for the additional services and duties required under this law, in addition to the salaries and fees now allowed such prosecuting attorneys by law, an amount equal to twenty-five per cent of the annual salary and fees of such prosecuting attorney, per annum to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose. * * *

In a previous opinion of this department rendered to the prosecuting attorney of Ripley County on July 18, 1949, in discussing the increased compensation allowed prosecuting attorneys of third and fourth class counties under House Bill 297, the writer found it necessary to define the phrase "salaries and fees" found in the Bill. It was his conclusion that the word "salary" referred to that compensation which he later termed "base" compensation of the prosecutor provided by Section 12939, and now similar to the provisions of Section 1, Laws of Missouri, 1945, supra. By the word "fees" he referred to that compensation allowed the prosecutor under the provisions of Section 9701. It appears that a correct definition, and differentiation of this phrase found in House Bill 297, was made, and that it is still proper under the provisions of the present law.

In attempting to arrive at the entire compensation to which the prosecuting attorney of a third class county is entitled, it is necessary for us to repeat some of the references to the statutes heretofore made.

The "base" salary of the prosecutor is found by referring to the correct amount fixed by Section 1, Laws of Missouri, 1945, supra. To this amount is added a sum equal to twenty-five per cent, which constitutes the prosecutor's "fees" under the provisions of Section 9701. To the total of these two sums is added a further sum of twenty-five per cent of such total, as authorized by the provisions of House Bill 297.

In your letter, reference is made to Section 13405 as the statutory authority relied upon by some prosecutors of third class counties for their practice of withholding twenty-five per cent of all fees collected by them in their official capacities which fees they claim belong to them and not to their counties.

Section 13405, is that section of the Mo. R.S.A. 1939, which provides that prosecuting attorneys shall be allowed fees under certain circumstances, and the circumstances and the amount of fee in each instance is set out. No mention is made as to whom the fee belongs, i. e., to the county or to the prosecutor, and no mention is made as to what disposition the prosecutor shall make of it. Certainly this section could not be relied upon as authority and justification for withholding any fees or any portion

of same by prosecuting attorneys of third class counties, who have evidently misinterpreted the meaning of said section.

As noted above the entire compensation to be paid such prosecuting attorneys is provided by Section 1, Laws of Missouri, 1945; Section 9701, Mo. R.S.A. 1939, and the provisions of House Bill 297 of 1949. These laws prescribe the amount, mode and particular manner of payment of the prosecuting attorneys' compensation and such prosecutors are not entitled to any further compensation, or to be paid the compensation allowed them by law in any other manner than that noticed above. We believe this principle of law to be well established in Missouri and that the case of Nodaway County vs. Kidder, 129 S.W. (2d) 857, to be in point.

In this case a county judge of Nodaway County, Missouri, sought to collect fees and mileage for attending county court in excess of the fees and mileage allowed by statute. In its opinion, the Supreme Court said at l.c. 860:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * * It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. * * *

Not being authorized by any statute to withhold as his own any fees collected by him in his official capacity, the prosecuting attorney must therefore account for same and pay them over to the treasurer of his county as provided by Section 3, Laws of Missouri, 1945, p. 1536, which section reads as follows:

"It shall be the duty of the prosecuting attorney, in counties of the third class, to charge, upon behalf of the county, every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he will immediately file with the clerk of the county court, and shall at the end of every quarter make out an itemized and accurate list of all fees in his office which have been collected by him, and one of

all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid--said report to be verified by affidavit--and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when collected to be turned over to the county treasury."

CONCLUSION

It is therefore the opinion of this department that the prosecuting attorney of a third class county is entitled to receive as compensation for his services the total amounts provided by Section 1, Laws of Missouri, 1945, p. 1536 and Section 9701, Mo. R.S.A. 1939, and House Bill 297 of 1949, and that the prosecuting attorney is not entitled under the provisions of said House Bill 297 to retain, withhold or receive back from the county twenty-five per cent of the fees collected by him under the provisions of Section 13405, Mo. R.S.A. 1939.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:



J. E. TAYLOR

Attorney General

PNC:nm

SCHOOLS

) Notice of bond election specifying purpose of
) bond issue to be purchase and removal of war
) surplus buildings and re-erection on school
) premises sufficient.

September 21, 1950



Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri

Attention: Mr. Alvin Papin

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"A transcript of proceedings relating to a bond issue in the amount of \$24,500 voted by the Mountain Grove School District No. C.D. 3 Wright County, Missouri, on the 8th day of August 1950, has been submitted to this office. All of the proceedings as shown in this transcript appear to be regular except the notice of the election, a copy of which is as follows:

"NOTICE FOR SPECIAL SCHOOL ELECTION

"Notice is hereby given to the qualified voters of the Mountain Grove School District No. C.D. 3 of Wright County, Missouri, that a special school election will be held at the schoolhouse in said school district on Tuesday, the 8th day of August, 1950, commencing at 7:00 A.M. and closing at 6:00 P.M., to vote up the following proposition:

"To authorize the Board of Education to issue bonds to the amount

Honorable W. H. Holmes

of \$24,500 for the purchase, and removal of war surplus buildings and the re-erection and furnishing of same on said school premises.

"Done by order of the school board this 19th day of July, 1950.

(District Seal) A. L. Wood (Signed)
Secretary of School
Board

"We desire to have an opinion from your office as to whether or not this constitutes a good and sufficient notice or whether it is objectionable to the extent that this office should refuse to register the bonds."

Section 10328, R. S. Missouri, 1939, provides in part as follows:

"For the purpose of purchasing school-house sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes; it shall be the duty of the clerk to sign and post said notices. * * * "

Honorable W. H. Holmes

The question insofar as the notice submitted by you is concerned is whether or not the purpose for which the bonds are to be issued is within the purposes specified by Section 10328, to-wit: "purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings."

We find no case in which a notice similar to that involved here has been passed upon by the courts of this state. In the case of Willis v. School District of Sedalia, 299 Mo. 446, 253 S.W. 741, a notice which specified the purpose of the bonds in the language of the statute, as above quoted, was held sufficient for the erection of a new high school building and the repair of another building within the district. The case of Hart v. Board of Education of Nevada School District, 299 Mo. 36, 252 S.W. 441, held that the purpose of the election may be set forth in general terms.

In the present situation the notice has set forth very specifically the purpose for which the bonds are to be issued. The notice does not use the exact words of the statute; however, one of the purposes for which bonds may be issued is "erecting schoolhouses." There is no limitation upon the method by which schoolhouses must be erected under this section. We think that the notice in the present situation has merely set forth with particularity the method which is to be followed in the erection of school buildings, and, therefore, is sufficient under Section 10328, R. S. Missouri, 1939.

CONCLUSION

Therefore, it is the opinion of this department that a notice for special election for the issuance of school bonds "for the purchase and removal of war surplus buildings and the re-erection and furnishing of same on


Honorable W. H. Holmes

said school premises" sufficiently sets forth that the purpose of said bond issue is "erecting schoolhouses" and, therefore, said notice is sufficient under Section 10328, R. S. Missouri, 1939.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General



J. E. TAYLOR
Attorney General

COUNTY COLLECTOR) Under Senate Bill No. 1024 and House Bill No. 2010,
) 65th General Assembly, County Collector receives
) ten cents per tract for making delinquent land list
) and County Clerk receives ten cents per tract for
) making back tax book, plus five cents per tract
COUNTY CLERK) for authenticating list.

September 27, 1950

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri



Attention: Mr. L. R. Shelton

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Please advise this Department with an official opinion on the following questions:

"What fees are county collectors entitled to for making and recording the delinquent land list of (a) current taxes and (b) the delinquent land list of back taxes, under Item 2, S.B. 1024, 65th General Assembly and Section 11182, R. S. Mo. 1939? 52.270

"What fees should county clerks charge for making the collector's delinquent land lists into a back tax book as provided in Section 140.137 of S. B. 1024?"

Section 11110, Laws of 1945, page 1847, provides: 140.030

"Whenever any collector shall be unable to collect any taxes specified on the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make lists thereof, one to be called the 'tangible personal

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property delinquent list', in which shall be stated the names of all persons owing taxes on tangible personal property, where taxes cannot be collected, alphabetically arranged, with the amount due from each, and the other to be called the 'land delinquent list', in which shall be stated the taxes on lands and town lots where taxes have not been collected, with a full description of said lands and lots, and the amount of taxes due thereon, set opposite each tract of land or town lot; and a like list of all delinquent clerks and other officers hereinbefore required to pay to the collector the amount of revenue by them respectively received, to be called the 'delinquent list of officers.'

Section 140.133, Senate Bill No. 1024, Sixty-fifth General Assembly, provides in part as follows:

"1. The county clerk shall file the delinquent lists in his office and within ten days thereafter make, under the seal of the court, the lists into a back tax book as provided in section 140.137.

"2. When completed, the clerk shall deliver the book to the collector taking duplicate receipts therefor, one of which he shall file in his office and the other he shall file with the director of revenue. The clerk shall charge the collector with the aggregate amount of taxes, interest, and clerks fees contained in the back tax book."

Section 140.143, Senate Bill No. 1024, Sixty-fifth General Assembly, provides:

"The county clerk and the county collector shall compare the collector's record of delinquent lands and lots with the corrected delinquent land list made pursuant to sections 11110 and 11114 Laws 1945, pages 1847 and 1910 respectively, and the clerk shall certify on the delinquent land list on file in his office that the list has been

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properly recorded in the collector's office and shall attach a certificate at the end of the recorded list in the collector's office that such record contains a true copy of the delinquent land list on file in his office."

(Underscoring ours.)

Section 140.15, Senate Bill No. 1024, Sixty-fifth General Assembly, provides in part as follows:

"2. For making and recording the delinquent land lists, the collector and the clerk shall receive ten cents per tract or lot and the clerk shall receive five cents per tract or lot for comparing and authenticating such list."

Section 52.25, House Bill No. 2010, Sixty-fifth General Assembly, provides:

"In all counties having a population of less than 100,000, the collector shall be allowed for services rendered in the collection of delinquent and back taxes, two per cent on all sums collected, such per cent to be taxed as cost and collected from the party redeeming; and for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

(Underscoring ours.)

This provision is practically identical with Section 11182, 52.25 R. S. Missouri, 1939, as amended by Laws of 1945, page 1847.

The steps for making the delinquent tax lists and back tax books, under the above provision, are as follows: The collector each year makes a list of taxes on the current books which he has been unable to collect. (Section 11110, supra.) The list is filed with the county clerk who makes the back tax book. (Section 140.133, supra.) The back tax book is delivered to

Honorable W. H. Holmes

the collector who proceeds to collect the taxes listed therein. Section 11117, R. S. Missouri, 1939, provided that the collector should enter the delinquent land list of record in his office. Senate Bill No. 1024 of the Sixty-fifth General Assembly revised this provision, and there is now no specific requirement that the collector enter such list of record in his office. The revision was made pursuant to the following recommendation of the Committee on Legislative Research (Appendix to Report No. 11, Part Two, page 426):

"140.133, 140.137, 140.143, 140.147, 140.15--
R. S. 1939 sections 11115 as amended Laws
1945 page 1897, 11117, 11120 as amended
Laws 1945 page 1910, and 11124 as amended
Laws 1945 page 1910, relate to the back
tax book.

"Section 11115 provides that the county clerk is to make a back tax book and deliver it to the collector who collects such back taxes; it further provides for the curing of omissions. Section 11117 provides that the clerk make the delinquent personal back tax book and the collector make the real estate back tax book, it further provides the fee for the clerk and collector in preparing the book. Section 11120 provides that the county clerk in the odd numbered years shall make up a back tax book and details the contents thereof. Section 11124 provides that the county clerk, annually between February 1st and July 1st, shall make up a back tax book and that the clerk and the collector shall compare them.

"The conflict and duplication among these sections are apparent from an examination of them. To resolve this situation it is suggested that these sections be repealed and five new sections enacted as follows:

"Section 140.133 to provide that the clerk make the back tax book each year

Honorable W. H. Holmes

and deliver it to the collector who proceeds to make collections from it. Section 140.137 to provide for the make up of the back tax book and for the interest rate on delinquent taxes, fees, etc. Section 140.143 to provide that the clerk and collector compare the list and for the clerk's certification. Section 140.147 to provide that the book be in alphabetical order in certain counties. Section 140.15 to provide the penalty against delinquent land and fees."

The committee thus recommended, and the amendment adopted by the Legislature pursuant to the recommendation resulted in, a change in the substantive law regarding the making of the back tax books. Section 11124, as amended by Laws of 1945, page 1910, contained the following provision:

" * * * And where the words 'back tax book' are now used in laws pertaining to the collection of taxes on delinquent lands, real estate and lots, the record of the list of delinquent lands and lots in the collector's office under the provisions of this law shall be held to be (where applicable and except as to city or town 'back tax book') such 'back tax book', and the recording of same by the collector and certification by the county clerk as herein provided, shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots. * * *"

Under this provision the duty of making the back tax book was actually placed in the hands of the county collector. The revision contained in Senate Bill No. 1024 of the Sixty-fifth General Assembly placed the duty in the hands of the county clerk, where it had been prior to amendments made in 1933. (Laws of 1933, page 425; Section 9945, R. S. Missouri, 1929.)

However, while transferring the duty of making the back tax book to the county clerk and eliminating provisions requiring the collector to record the delinquent tax lists in his

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office, provisions relating to such recording there were retained. Section 140.143 of Senate Bill No. 1024, quoted above, makes reference to recording in the collector's office. Furthermore, section 11182, R. S. Missouri, 1939, as amended by Laws of 1945, page 1847, which provided the collector's fee for recording the delinquent list was re-enacted in substantially the same form by Section 52.25, House Bill No. 2010, supra. In view of the confusion resulting from the recommended changes by the Committee on Legislative Research, we must attempt to ascertain the manner and amount of fees which may be charged in accordance with the well-settled principles concerning fees of county officials.

"It is the well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed." (Ward v. Christian County, 341 Mo. 1115, 111 S.W. (2d) 182, 1. c. 183.)

Your first inquiry concerns the fee which the collector may receive for making and recording the delinquent land lists of current taxes. Section 104.15 of Senate Bill No. 1024, supra, provides:

"For making and recording the delinquent land lists the collector and the clerk shall receive ten cents per tract or lot. * * *"

No duty is now imposed on the collector to record the list. He is required to make it, and under this provision would be entitled to ten cents per tract or lot included on said list. Inasmuch as he is not now required to record the list the provisions of Section 52.25 of House Bill No. 2010, supra, are not applicable and the collector may not claim any fees under that section.

As for the second part of your inquiry relative to the collector's fees, we find no statute imposing upon him the duty of making or recording the delinquent land lists of back taxes. Therefore, he is entitled to no fees in this regard.

Your second inquiry concerns the fees of the county clerk. As pointed out above, the county clerk is now required to enter

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the delinquent land lists in the back tax books. Section 104.15 of Senate Bill No. 1024, supra, provides that the collector and clerk shall receive ten cents per tract or lot for making and recording the delinquent land lists. That section further provides that "the clerk shall receive five cents per tract or lot for comparing and authenticating the list."

Under this provision we feel that the clerk should receive ten cents per tract for recording the lists in the back tax book and five cents per tract for comparing and authenticating the list. Section 52.25 of House Bill No. 2010, supra, which provides the fee of twenty-five cents per tract for the collector for recording the delinquent land lists would not be available to permit the collection of such fee by the county clerk inasmuch as said provision provides that it shall be payable to the collector.


CONCLUSION

Therefore, it is the opinion of this department that under the terms of Senate Bill No. 1024 and House Bill No. 2010, Sixty-fifth General Assembly, the county collector is entitled to receive ten cents per lot or tract for making the delinquent land lists of current taxes and is not required to make a delinquent land list of back taxes, and, therefore, may receive no fees for such services. We are further of the opinion that under said bills the county clerk should charge, for making the collector's delinquent land lists into a back tax book, ten cents for each lot or tract recorded in said book, plus five cents for each lot or tract for comparing and authenticating the list.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

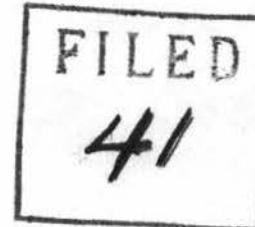
RRW/feh

COUNTY CLERKS: County clerks of third and fourth class counties entitled to retain fees for extending the tax books for 1947 and 1948.

Handwritten notes:
Missouri
on file
9-25-50

December 15, 1950

Honorable W. H. Holmes
State Auditor
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"In an opinion dated November 23, 1949, your department advised me that county clerks of the third and fourth class counties were entitled to retain the fee provided for extending the tax book.

"This department would like to know if the county clerks of such counties are entitled to retain the fee for extending the tax books for the years 1947 and 1948."

As you state in your request, this department, in an opinion to you dated November 23, 1949, held that House Bill No. 126 of the 65th General Assembly, which is now Section 11238, Laws of Missouri, 1949, page 619 (whereby county clerks were allowed a fee of three cents per name for extending the tax book), repealed Section 11049, Laws of Missouri, 1947, Vol. II, page 429. The opinion further held that the county clerks of the third and fourth class counties were entitled to draw this fee as compensation for extending the 1949 tax books.

The question presented in this opinion is whether the county clerks of the third and fourth class counties are entitled to retain the fee for extending the tax books in the years 1947 and 1948.

The previous opinion reviewed the history of Sections 11238 and 11049 at great length, and we will not in this opinion repeat what was said there. In concluding the discussion of the two statutes the opinion said: "Therefore, it would

Honorable W. H. Holmes

appear that the fee allowed to the county clerk for extending taxes has been, and is now, an unaccountable fee." The opinion further said that "this fee allowed the county clerks has, at least since November, 1945, been unaccountable, and therefore the provision of House Bill No. 126 did not increase compensation during the present term of the clerks, which began January 1, 1947."

Therefore, we believe that the reasons set forth and advanced in the previous opinion are equally applicable to the fees in the instant case, that the county clerks are entitled to retain the fee provided for extending the tax books for 1947 and 1948, and that such fees are unaccountable.

CONCLUSION

It is therefore the opinion of this department that the county clerks of third and fourth class counties are entitled to retain the fee provided for extending the tax books for 1947 and 1948, and that such fees are unaccountable.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

OK

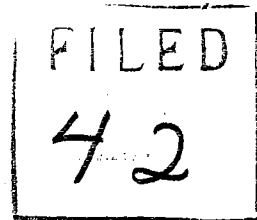
J. E. TAYLOR
Attorney General

AMO'K:ml

DEEDS OF TRUST:
MORTGAGES:
NEWSPAPERS:

Newspaper notice for the foreclosure of a deed of trust on property lying within that part of Kansas City located in Clay County must be made in newspapers published in Kansas City and Clay County.

November 16, 1950



Honorable John Hoshor
Senator
Fifteenth District
Missouri Senate
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"The question has come up in Clay County as to the proper procedure in foreclosing deeds of trusts in an annexed area. Some are of the opinion it should be advertised in the Kansas City newspapers (Jackson County) as well as in the Clay County paper. Others are of the opinion that if it is advertised in a Clay County paper, it is sufficient.

"I understand there is no weekly or daily newspaper in the annexed area, which is the reason this particular question has arisen.

"Please be so kind as to give me an opinion on this matter before steps are taken in the legislature. I will appreciate your help very much."

The law governing publication of newspaper notices for foreclosure of mortgages and deeds of trust is found in Section 443.32, Senate Bill No. 1125, 65th General Assembly of Missouri.

"Section 443.32 (3464). Such notice shall set forth the date and book and page of the record of such mortgages or deeds of trust,

Honorable John Hoshor

the grantors, the time, terms and place of sale, and a description be given by advertisement, inserted for at least twenty times, and continued to the day of the sale, in some daily newspaper, in counties having cities of fifty thousand inhabitants or more, and in all other counties such notice shall be given by advertisement in some weekly newspaper published in such county for four successive issues, the last insertion to be not more than one week prior to the day of sale; or in some daily, tri-weekly or semi-weekly paper published in such county at least once a week for four successive weeks, said notice must appear on the same day of each week, the last insertion to be not more than one week prior to the day of sale, and if there be no newspaper published in such county or city, such notice shall be published in the nearest newspaper thereto in this state: Provided, that nothing herein contained shall be construed to authorize the giving of any shorter notice than that required by such mortgage or deed of trust; Provided further, that where the property to be sold lies wholly or in part within the corporate limits of any city having or that may hereafter have a population of fifty thousand inhabitants or more, then the notice provided for in this section shall be published in a daily newspaper in such city."

Such section, which was Section 3464, Laws of Missouri, 1943, p. 402, had the same provisions insofar as publication in counties and cities are concerned as does the present law and was, of course, in effect long before a portion of Kansas City, Missouri was located in Clay County, Missouri.

We believe the obvious intent of the statute as originally enacted was to require the publication in a daily newspaper in a city of over fifty thousand where such city was located within the county itself. Of course, where a city was located wholly within a county, such publication in a daily newspaper published within such city was also publication in a newspaper published in the county.

It is our view, therefore, that the publication required by Section 443.32 of Senate Bill No. 1125 must be made in a daily

Honorable John Hoshor

newspaper published within Kansas City and also in a newspaper published in Clay County where the property to be sold lies wholly or in part within the corporate limits of that part of Kansas City located in Clay County. We believe this view is buttressed by the fact that almost invariably, mortgages or deeds of trust contain the provision that the notices of sale required before such mortgages or deeds of trust can be foreclosed are to be published in a newspaper published in the county wherein the land is located.

It will be necessary for the Legislature to amend such section before it can be held that publication in a newspaper published in a city wherein the land is located, but not published in the county wherein the land is located, is sufficient.

CONCLUSION

It is the opinion of this department that the notice required by Section 443.32, Senate Bill No. 1125 of the 65th General Assembly, must be published in a daily newspaper published in Kansas City and in a newspaper published in Clay County, when the property to be sold lies wholly or in part within that part of the corporate limits of Kansas City located in Clay County, Missouri.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PROSECUTING ATTORNEYS:
ELECTIONS:

Candidate for office of prosecuting attorney not required to be licensed attorney to be eligible for nomination. County Clerk must receive said candidate's declaration and place his name on the ballot.

February 15, 1950.

FILED 44

Honorable Claude R. English
Representative from Moniteau County
California, Missouri



Dear Mr. English:

We have your recent request for an opinion from this office. Your letter of request is as follows:

"In our county we have a young man who desires to become a candidate for Prosecuting Attorney who is not now a member of the Bar. He has been a resident of the county for more than one year and is a qualified voter. He expects to graduate from the Law Department of the University of Missouri in June of this year, and he expects to take the bar examination and be admitted to the Bar during this year, but probably after the August primary.

"Will you kindly give me an opinion as to whether the proposed candidate can properly file his declaration and the county clerk should receive the same and place his name on the ballot."

Section 12934, R.S. Missouri, 1939, describing election and qualifications of prosecuting attorneys is as follows:

"At the general election to be held in this state in the year A.D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified."

Mr. English
California, Mo.

You will note that the statute above set out does not provide, in express terms, when the candidate must possess the qualifications contained in said section. It merely provides that "there shall be elected * * * a prosecuting attorney, who shall be a person * * * duly licensed to practice law in this state, * * *." There is no language other than the provision for residence to indicate whether the candidate must possess said qualifications at the time of nomination, election, commencement of the term, or induction into office. The statute merely recites that on the date of the general election a prosecuting attorney shall be elected. Then it goes on to detail the qualifications which the prosecutor must possess, without specifying on what, or by what date said qualifications must be possessed. That this omission is not unusual is emphasized by the following quotations:

42 Am. Jur. Sec. 39, page 910:

"The courts are frequently called upon to determine the question as to when the conditions of eligibility to office must exist, whether at the time of election, the commencement of the term, or the induction into office. In ascertaining this matter, the language used in the constitutional or statutory provision declaring the qualifications is to be considered. It may expressly or by necessary implication specify the time when the required eligibility must exist. Where such is the case, there can be no question but that the candidate must possess the necessary qualifications at that time. * * *"

42 Am. Jur. Sec. 40, page 911:

"If the Constitution or statutes do not specify the time when the conditions of eligibility must exist, it is necessary for the courts to have recourse to some other means of determining the matter. The terms employed in declaring the qualifications are to be taken into consideration. And since these are necessarily variant, it is not strange that the courts have reached different conclusions. * * *"

27 C.J.S. page 375:

"The authorities disagree as to whether eligibility for the office of prosecuting attorney should be determined as of the time of election or as of the time of induction. * * *"

Mr. English
California, Mo.

"Time to which eligibility relates. The question whether eligibility to hold office of district or prosecuting attorney has reference to the time of election to the office or to that of induction into office is the subject of conflicting decisions, some statutes being construed to have reference to the time of election or appointment, while others have been construed to refer to the time of induction into office. * * *"

The courts have placed various interpretations on such an omission. The following cases deal with the question of the time by which the qualifications must be possessed.

Enge v. Cass, 148 N.W. 607, 1.c. 608:

"* * * we shall assume that by necessary implication, both from the Constitution and statutes, no person is competent to qualify and enter upon the discharge of his duties as state's attorney unless he is first duly licensed to practice as an attorney and counselor at law in the courts of this state.

"It does not follow, however, that he must have possessed such qualification at the date of his election. In other words, if at such time he was an elector of the county, he possessed sufficient qualification to render him eligible as a candidate at the election."

State ex rel. Flynn v. Ellis, 98 P. 2d 879, 1.c. 882:

"That the legal qualifications for holding public office are not in every instance required to be present at the time of election, is seen by reading provisions in the state and federal Constitutions relating to senators, representatives, judges, etc.; e.g. section 3, Article I, United States Constitution, U.S.C.A.: 'No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not when elected, be an Inhabitant of that State for which he shall be chosen.'

Mr. English
California, Mo.

"In 22 R.C.L., section 43, page 403, we find this language: 'The courts do not agree as to the time at which the eligibility or qualification of a person for public office must be determined. The question has arisen most frequently under statutory or constitutional provisions using the words "eligible" in connection with certain qualifications or disqualifications for public office. One line of authorities holds that the time of election is the proper time to test whether a person is qualified or eligible, and that it is immaterial that a person then disqualified removes the disqualification before actually entering on the duties of the office. * * *'"

We have been unable to find any case in which the instant question was directly before the Courts of this State. The Supreme Court of Missouri, in State v. Sanderson, 280 Mo. 258, briefly touched on the question but was not called upon to decide it.

An exhaustive review of the authorities from other states reveals, as stated heretofore, a definite division of opinion as to whether the statutes have reference to eligibility at the date of election, or at the time of taking office. We have, however, found not one case which even suggests that the statutory requirements for eligibility to office, such as the one with which we are here dealing, must be met before the election.

Since no authorities state that a candidate must, in the absence of a specific and express statute to the contrary, possess such qualifications before the date of his election, we are led to the conclusion that a candidate for the office of prosecuting attorney need not be a licensed member of the Bar before the date of his election.

CONCLUSION

It is the opinion of this office that a candidate for the office of prosecuting attorney need not be a duly licensed

Mr. English
California, Mo.

attorney in order to file his declaration of candidacy, nor to be eligible for nomination. The County Clerk must receive said declaration and place the candidate's name on the ballot.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HJD:cg

PUBLIC RECORDS:
DIVISION OF
INDUSTRIAL INSPECTION:

Individual statistical reports filed with Division of Industrial Inspection are public records subject to inspection by those parties showing an interest therein. Inspection reports made by Division not subject to inspection.

March 10, 1950

3/30/50



Honorable Lon N. Irwin
Director
Division of Industrial Inspection
Department of Labor and Industrial Relations
Jefferson City, Missouri

Dear Mr. Irwin:

This department is in receipt of your recent request for an official opinion. This request is as follows:

"The Division of Industrial Inspection of the Department of Labor and Industrial Relations would like an opinion on whether or not this Division has the right to refuse to give information in regard to the individual statistical reports that are made to this Division. Employers are required to fill out these forms and return them to the Industrial Inspection Division under penalty of Section 13185, Laws of 1929. We have been requested to furnish this information on several occasions but we have not given out information of this kind to any competitors in the various businesses in which they may be engaged.

"We have had inquires on our inspection sheets to tell them whether or not the condition was good or bad at the last inspection of the plants that were inspected. In court tests against the Workmen's Compensation information may be damaging to either side in the court contests and we do not put out this information, only through court action for the forms to be brought to the courts for evidence.

"As our statistical reports are received individually our reports are made and broken down in the various divisions by the counties and totaled by the state. We do not print any information in regard to the statistical report of any individual manufacturer.

Honorable Lon N. Irwin

"I would appreciate very much an opinion from your office. I am enclosing copies of statistical forms and the book for the State statistical report for the Division of Industrial Inspection."

The 63rd General Assembly created and established the Department of Labor and Industrial Relations, said department to be under the control, management and supervision of the Industrial Commission of Missouri (Section 1, Laws Missouri, 1945, page 1102). There was also created a Division of Industrial Inspection of the Department of Labor and Industrial Relations, with a director thereof, which director "shall perform all duties and have all the power and responsibilities imposed and conferred upon the Commissioner of Labor and Industrial Inspection, except as otherwise provided by law" (Section 12(c), Laws Missouri, 1945, page 1106).

Section 10154, Laws Missouri, 1945, page 1100, reads:

"The Industrial Commission of Missouri, with the assistance of the director of the division of industrial inspection of the department of labor and industrial relations shall, on or before the first day of February of each year, present a report in writing to the Governor, which shall contain statistical details relating to the operation of the division under Chapter 68 of the Revised Statutes of Missouri, 1939, including such information as is contemplated by Section 10153 thereof."

Section 10153, R. S. Mo. 1939, provides:

"The object of this department shall be to collect, assort, systematize and present an annual report to the governor, to be by him transmitted biennially to the general assembly, statistical details and information relating to all departments of labor in the state, especially in its relations to the commercial, industrial, social, educational and sanitary conditions of the laboring classes and to the permanent prosperity of the productive industries of the state."

Section 10159, R. S. Mo. 1939, provides:

"It shall be the duty of every owner, operator or lessee of any factory, foundry or machine shop or other manufacturing establishment doing business within this state to report annually,

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on or before the first day of March, to the commissioner of labor and industrial inspection, the name of firm, or corporation and the number of members, male and female, constituting the same; where located; capital invested in grounds, buildings and machinery; class and value of goods manufactured; aggregate value of raw material used; total number of days in operation; amount paid yearly for rent, tax and insurance; total amount paid in wages; total number of employees, male and female; number engaged in clerical and manual labor, with detailed classification of the number and sex of employees engaged in each class, and average daily wages paid to each."

Section 10160, R. S. Mo. 1939:

"The commissioner of labor and industrial inspection is hereby authorized to furnish suitable blanks to the owner, operator, manager or lessee of any factory, workshop, elevator, foundry, machine shop or any other manufacturing establishment, to enable said owner, operator, manager or lessee to intelligently comply with the provisions of section 10159 of this article; and any such owner, operator, manager or lessee who shall neglect or refuse to comply with the provisions of this article, or who shall untruthfully answer any question or questions put to him by the commissioner, in a circular or otherwise, in furtherance of the provisions of sections 10158 and 10159 shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars.

Pursuant to Section 10160, supra, a form labeled "Census of Manufacturing and Wage Schedule", (copy attached), is furnished by the Division of Industrial Inspection to such persons as are named in Section 10159, supra, with blank spaces in which such information as is required by said Section 10159 is to be written. When these completed forms are returned to the Division of Industrial Inspection, they furnish the data from which is obtained such statistical information as the Division is required to prepare. Your first question is whether or not the Division of Industrial Inspection has the right to refuse to give or allow to be obtained any information contained in any individual report made to the Division pursuant to the above statutes.

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In the case of State ex rel. v. Henderson, 169 S.W. (2d) 389, 350 Mo. 968, the Supreme Court of Missouri defined a public record at l.c. 392 as follows:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann. Cas. 1913E, 1208; Robison v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179; Ann. Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W. 2d 28."

It is specifically provided by statute that the reports in question be made to the Division of Industrial Inspection. There is no statutory provision which might take them out of the operation of the rule laid down in State ex rel. v. Henderson. It must be concluded that these reports have the status of public records.

The fact that these reports constitute questionnaires from which data is obtained to prepare the statistical report provided for by Section 10153, supra, does not affect this conclusion. It was held in the case of People v. Peck, 34 N.E. 347, 138, N.Y. 386, 20 L.R.A. 381, in which the commissioner of statistics of labor was criminally tried for the destruction of reports similar in nature to those here under consideration, that though a public officer has prepared a report based on questionnaires filed in this office, the questionnaires do not thereby lose their character as public documents.

Now that it has been concluded that these reports constitute public records, there remains the question of whether or not they are subject to inspection, and by whom. At the top of these blank forms we find the following:

"NOTICE: The information requested in this report has nothing to do with your income tax or sales tax, and is handled as confidential information by this Division for statistical purposes only."

We feel that this "Notice" is of no legal effect whatsoever. Either the forms provided for and filed pursuant to the above statutes, by their very nature, constitute public records subject to inspection, or they do not. If they are such as are subject to inspection, this "Notice," whether provided for by a rule, regulation or mere stipulation of the Division, would be of no avail as the Division would be without authority to change the legal nature of these forms unless specifically authorized by statute to do so. And there is no statute

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authorizing such rule or regulation. We quote from the case of *People v. Peck*, supra, at l.c. 351:

"* * *If these papers contained material and pertinent information collected under the act, and for the purposes contemplated by the act, then the indictment could not be defended on the ground that the papers were the private papers of the persons sending them to the commissioner, or that the information thus communicated was confidentially disclosed. The statute makes it the duty of the commissioner to procure the information, and makes it the duty of the persons designated to give it, and when the information is given it becomes public, and is for a public purpose, and no stipulation or promise on the part of the commissioner can give it any other character."

There is no statutory authority regarding the question of who may inspect the public records of the Division of Industrial Inspection. Under Section 645, R. S. Mo. 1939, the common law remains in force in the State of Missouri unless repugnant to the Constitution of the United States, or the Constitution or legislative acts of this State. We find the common law rule relative to who may inspect public records stated in 45 Am. Jur., Records and Recording Laws, paragraph 17, page 427, as follows :

"There is authority to the effect that according to the English common law there is no right in all persons to inspect public documents or records. It is, however, to be noted that the English courts have seldom been called upon to enforce a private individual's right to inspect public documents and records except where the inspection was desired to secure evidence in a pending or prospective suit. Accordingly, there was formulated the following common-law doctrine: Every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. This rule, it is said, is not so much a denial of the right of every citizen to inspect the public records and documents as a declaration of the interest which a private individual must have to avail himself of

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the extraordinary writ of mandamus to enforce his right. In theory the right is absolute, yet in practice it is so limited by the remedy necessary for its enforcement that it can be denominated only a 'qualified right.' The existence of a suit is not, however, a sine qua non for the exercise of the right."

We therefore see that the common law right to inspect public records is not an unqualified right, but that it is limited to those individuals who may maintain mandamus to enforce the right. As to who may invoke mandamus, we quote from the case of *Clement v. Graham*, 63 A. 146, 78 Vt. 290, (cited in *State ex rel. v. Henderson*, supra), where the court at l.c. 155 stated:

"* * *We think the true rule, however, is that stated by Mr. High in his work above cited, Sec. 431. He says: 'A distinction is taken between the cases where the extraordinary aid of a mandamus is invoked merely for the purpose of enforcing or protecting a private right, unconnected with the public interest, and cases where the purpose of the application is the enforcement of a purely public right, where the people at large are the real party in interest. And, while the authorities are somewhat conflicting, yet the decided weight of authority supports the proposition that, where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest, and his right must clearly appear. Upon the other hand, when the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws.'"

It is certainly not the enforcement of a common or public right which prompts competitors of individuals filing forms with the Division of Industrial Inspection to inspect such forms. They would be precluded from inspecting such records as citizens and taxpayers interested in the enforcement of a public right. Nor do we feel that a competitor has such a tangible and direct interest in these

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records as would permit inspection. It is merely idle curiosity that competitors of the individuals filing these forms wish to satisfy when they seek to inspect these records. And we do not deem them to have for this reason sufficient interest in these records as would justify their access to inspection of same. It is therefore our opinion that the records filed with the Division of Industrial Inspection pursuant to Section 10159 are public records subject to inspection by individuals having an interest in same. However, competitors of parties who have filed such reports who merely wish to inspect same out of idle curiosity do not possess such an interest. They do not have the clear legal right which would permit invoking mandamus to enforce same.

The other question presented in your opinion request is whether or not information regarding the condition of plants inspected by the Division should be divulged upon request for same.

Section 10179, R. S. Mo. 1939, reads in part:

"* * *It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. * * *"

(Underscoring ours.)

Section 10174, Laws Missouri, 1947, Volume I, page 356, and Sections 10222, 10233, 10251 and 10259, R. S. Mo. 1939, confers upon the Commissioner of Labor and Industrial Inspection the duty of making the inspections provided for by the various articles of Chapter 68 relating to inspection and health and safety of employees and also provides them with the authority to prosecute for violations of the provisions thereof. Violations of these provisions are made misdemeanors by the statutes and penalties provided therefor. These powers and duties now rest in the Division of Industrial

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Inspection and the director of said division. Pursuant to these statutes inspections are made and inspection sheets filled out with the results of the inspections. Assuming such reports to be public records, we feel that they are not subject to inspection.

The division in enforcing the inspection laws of the state acts as a law-enforcing agency. Its inspection records, though they may be of a public nature, are the result of inspections made for the purpose of ascertaining violations of law and the subsequent prosecution of such offenses. Such records have been held to be secret and not subject to inspection; *Lee v. Beach Pub. Co.*, 173 So. 440, 127 Fla. 600; *Re Egan*, 98 N.E. 467, 205 N. Y. 147, *Ruryon v. Board of Prison Terms and Paroles*, 79 P. (2d) 101, 26 Cal. App. (2d) 183. In *Lee v. Beach Pub. Co.*, supra, there was a city ordinance providing that all records of the city be open for inspection, yet the court held at l.c. 442, that:

"The appellant contends that there are certain records in the police department of a city which must be kept secret and free from common inspection as a matter of public policy. This is true. The rule as stated in 23 R.C.L. 161, is as follows:

"The right to inspection does not extend to all public records and documents for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection, such for example, as diplomatic correspondence and letters and dispatches in the detective police service or otherwise relating to the apprehension and prosecution of criminals."

It is therefore our conclusion that since the inspection records are made in the enforcement of the inspection laws and since they are instrumental in the prosecution of violators of such laws, they fall within that class of records which the case of *Lee v. Beach Pub. Co.* holds that public policy demands that they be kept free from common inspection.

CONCLUSION

It is therefore the opinion of this department that the individual statistical reports filed with the Division of Industrial Inspection pursuant to Section 10159, R. S. Mo. 1939, are public records subject to inspection by those persons having an interest therein. However, competitors of those individuals filing such

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forms who wish to inspect these records merely out of idle curiosity do not possess such an interest as will permit inspection.


It is further the opinion of this department that the inspection reports made by the Division of Industrial Inspection are of that class of records that public policy demands be kept free from inspection.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



RMV:hr

TAXATION:

SALES FOR DELINQUENT TAXES:

Surplus from general tax sale of lands after payment of delinquent taxes, interest, penalty and costs should be paid to owner of lands at time of tax sale and not to grantee of deed from such owner subsequent to such tax sale where deed purports to convey grantor's interest in said lands and no reference is made to right to surplus.

April 19, 1950

Honorable David E. Impey
Prosecuting Attorney
Texas County
Houston, Missouri



4/20/50

Dear Sir:

This is to acknowledge receipt of your recent letter requesting a legal opinion of this department. Said request reads as follows:

"The County Court of this county is faced with several cases involving the right to overplus from tax sales under the Jones-Munger act. I therefore request your opinion upon the following question:

"Is the grantee in a deed, made by one who was record owner of the lands purported to be conveyed by that deed at the time of the prior sale for taxes under the Jones-Munger act, entitled to the overplus arising from such prior tax sale?

"Are the rights to such overplus affected by

- (a) whether such subsequent deed is a quit-claim deed or a general warranty deed? and,
- (b) whether such deed is made before or after the period within which redemption from such tax sale might be had?"

Section 11132, Laws of 1945, page 1850, reads in part as follows:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute

arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto. * * *

In the case of Holly vs. Rolwing, 230 Mo. App. 33, the right to a surplus arising from a general tax sale under a statute which has since been repealed, (but similar in effect to Section 11132, supra) was involved. The court held that the surplus arising from such sale belonged to the owner at the time of the sale and not to a levee district which claimed it was entitled to the fund as the holder of a junior lien on the lands at the time of the tax sale. The opinion of the court indicated that the surplus partook of the nature of personal property and not realty as contended by the levee district, and that the district had no lien on the surplus to the extent of the amount owed to it by the owner of the lands. In discussing this matter, the court said in l.c. 42:

"As we read the statute with reference to collection of delinquent levee taxes we find no provision that would authorize such an action as herein brought that would establish a lien upon the surplus money left after a sale by the State for the collection of general taxes. Nor do we find any authority by the courts of this State that would authorize our so holding.

"* * * there is no provision in the statute giving the drainage or levee districts the right to follow the surplus derived from a sale under a procedure to collect general taxes, * * *

In view of the provisions of Section 11132, supra, and the ruling announced in the above cited case, the answer to your first inquiry will be that the owner of the lands at the time of the delinquent tax sale is entitled to the surplus arising from such sale, rather than a grantee in a deed from such owner where the deed was made subsequently to the tax sale.

You make the further inquiry: "Are the rights to such overplus affected by (a) whether such subsequent deed is a quitclaim deed or a general warranty deed, and (b) whether such deed is made before or after the period within which redemption from such tax sale might be had?"

In the Rolwing case, supra, it was indicated that the right to a tax surplus was personal property, and did not partake of the nature of realty, and that such right to the tax surplus was in the owner of the land at the time of the tax sale. In view of the

ruling in this case, the right to the tax surplus being personalty, neither a quitclaim deed nor a warranty deed would operate as an assignment of the surplus funds arising from the sale of real estate for taxes. The right of the owner of the land at the time of the sale to the surplus would not be affected by any subsequent conveyance.

Your last inquiry found in subsection (c) is stated: "Are the rights to such overplus affected by whether such deed is made before or after the period within which redemption from such tax sale might be had?"

Section 11130, Mo. R.S.A. 1939, provides in part as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed.* * *

It appears that the effect of this section is that the sum bid for lands sold for taxes at the first or second offering shall be the amount of the delinquent taxes, interest, penalty and costs provided by law. Since no provision is made for a surplus over the actual amount due, it appears to be the intention of the framers of this section of the Jones-Munger Act that there should be no surplus. Properly a surplus can arise only at the sale of land which has been advertised for three times, commonly referred to as a "third time sale" where there is no period of redemption. Such was the situation in the Rolwing case, 230 Mo. App. 33, heretofore cited as holding that the surplus was personal property.

Your letter indicates, and it is learned, that in some counties land advertised for the first or second time has been sold to the highest bidder, thus creating a surplus in excess of the amount necessary to pay taxes, interest and costs. While such a sale is not contemplated or authorized by the statute, the surplus arising from such a sale certainly would be personal property of the owner of the real estate at the time of sale and not affected by any subsequent conveyance of the real estate.

It is assumed and your inquiry indicates that the deed is in usual form and purports to convey only real estate and does not purport to assign the surplus arising from the sale.

Conclusion

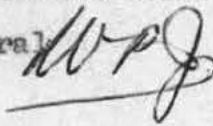
It is, therefore, the opinion of this department that the owner of the land at the time of sale and not his grantee in a deed purporting to convey the land at a time subsequent to the sale of such land for delinquent taxes, interest, penalty and costs is entitled to the surplus arising from such sale, such surplus being personal property and not constituting any right, title or interest in the land described in the deed.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



PNC:nm

LIQUOR LICENSE: One who obtains license which permits intoxicating liquor to be consumed on his premises is subject to pay fee fixed by county court within limits fixed by law, and may be prosecuted for failure to do so.

January 24, 1950 12-280

Honorable D. R. Jennings
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion upon the following:

"Request advice as to whether or not County Courts in Counties of the Third Class may require persons who hold a license under Sec. 4895a R. S. Mo. A., Laws of Mo. 1945, p. 1033, (commonly called 'set-up Licenses'), to pay a license fee into the County Treasury.

"Section 4904 R S Mo A states in part: 'In addition to the permit fees and license fees and inspection fees by this act required to be paid into the State Treasury every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, * * *, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court * * * shall by order of record determine, * * *.'

"I am unable to find anything in said Sec. 4895a that prevents Sec. 4904 from applying.

"Further, if the county court has such authority will the provisions of Sec. 4933, R. S. Mo A apply for failure to pay such county license fee?"

The pertinent part of Laws of Missouri, 1945, page 1042, (Section 4895a), states:

Hon. D. R. Jennings

"It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intoxicating liquor in, on or about said premises between ten o'clock P.M. and six o'clock A.M. the following day without having a license as in this section provided.

"Application for such license shall be made to the Supervisor of Liquor Control on forms to be prescribed by him, describing the premises to be licensed and giving all other reasonable information required by the form. The license shall be issued upon the payment of the fee required herein. A license shall be required for each separate premises and shall expire on the 30th day of June next succeeding the date of such license. The license fee shall be \$60.00 per year and the applicant shall pay \$5.00 for each month or part thereof remaining from the date of the license to the next succeeding 1st of July. Applications for renewals of licenses shall be filed on or before the 1st of May of each year.

"The drinking or consumption of intoxicating liquor shall not be permitted in, upon or about the licensed premises by any person under twenty-one years of age, or by any other person between the hours of 1:30 A.M. and 6:00 A.M. on any week day, and between the hours of 12 o'clock midnight Saturday and 12 o'clock midnight Sunday, or on the day of any general, special, or primary election in this state, or upon any county, township, city, town, or municipal election day during the hours the polls are legally open. Licenses issued hereunder shall be conditioned upon the observance of the provisions of this Act and the regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink. The provision of this section regulating the drinking or consumption of intoxicating liquor between certain hours and on Election day and Sunday shall apply to premises licensed under this Act to sell intoxicating liquor by the drink. In any incorporated city having a population of more than twenty thousand (20,000) inhabitants, the Board of Aldermen, City Council, or other proper authorities of incorporated cities may, in addition to the

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license fee herein required, require a license not exceeding Three hundred dollars (\$300.00) per annum, payable to said incorporated cities, and provide for the collection thereof; make and enforce ordinances regulating the hours of consumption of intoxicating liquors on premises licensed hereunder, not inconsistent with the other provisions of this law, and provide penalties for the violation thereof.

* * *

"Any premises operated in violation of the provisions of this section or where intoxicating liquor is consumed in violation of this section, is hereby declared to be a public and common nuisance and it shall be the duty of the Supervisor of Liquor Control and of the Prosecuting or Circuit Attorney of the City of St. Louis, and the Prosecuting Attorney of the county in which the premises are located to enjoin such nuisance.

"Any person operating any premises, or any employee, agent, representative, partner or associate of such person, who shall knowingly violate any of the provisions of this section, or any of the laws or regulations herein made applicable to the conduct of such premises, shall, upon conviction, be deemed guilty of a misdemeanor."

* * * * *

Section 4904, R. S. Mo., 1939, reads:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court, or the corresponding authority in the city of St. Louis, as the case may be, shall by order of record determine, and shall pay into the

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treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, (not exceeding one and one-half times the amount by this act required to be paid into the state treasury for such state permit or license), as the law-making body of such municipality, including the city of St. Louis may by ordinance determine."

In the case of State v. Skinner, 119 S.W.(2d) 82, the court said:

"We think there is no merit to the above assignment for under the provision of Section 25, Laws of Missouri, 1935, page 276, Mo. St. Ann. Sec. 4525g--29, p. 4689, (Sec. 4904) counties are authorized to charge for licenses and may issue a license upon the payment of such charges. Section 43 on page 282, Laws of Missouri, 1935, Mo. St. Ann. Sec. 4525g--48, p. 4689, (Sec. 4933) provides a penalty for violating said act. It was not error to refuse to quash the information."

In view of what appears to us to be the plain meaning and intent of Section 4904, and in further view of its construction in the Skinner case quoted above, it is our conclusion that one who obtains a liquor license under Section 4895a, may be taxed by a county within the limits of and under Section 4904, and that for failure to pay into the county treasury the fee fixed by the county court under Section 4904 prosecution may be instituted under Section 4933.

CONCLUSION

One who obtains a liquor license under Laws of Missouri, 1945, page 1032 (Section 4895a) may be taxed by a county within the limits of and under Section 4904, and for failure to pay into the county treasury the fee fixed by the county court under Section 4904 may be prosecuted under Section 4933.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPW:mw

PROBATE JUDGE:

A person not eligible to hold office on the day of the commencement of the term of the office cannot qualify for the office four months after the beginning of the term.

March 29, 1950



Mr. Duncan R. Jennings
Prosecuting Attorney
of Montgomery County
Montgomery City, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion. You thus state your opinion request:

"Will you please give me an opinion based on the following facts, to-wit:

"A person files as a candidate for office of Probate Judge, is nominated, elected and receives his commission. He lacks four months of being 25 years of age on January 1, 1951.

"Can this party wait four months before he qualifies?"

Article V, Section 25, of the 1945 Missouri State Constitution, states, in part:

"* * * Probate judges shall be at least twenty five and magistrates at least twenty two years of age. * * *"

(Underscoring ours.)

Section 2438, Mo. R. S. A. 1939, states:

"At the general election in the year 1878, and every four years thereafter, except as hereinafter provided, a judge of probate shall be elected by the qualified voters

Mr. Duncan R. Jennings

in every county. Said judge shall be commissioned by the governor and shall take the oath prescribed by the Constitution for all officers and shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified: Provided, that in all cases where the death of the judge-elect shall take place after his election and before he qualifies, the same shall constitute a vacancy in such office from and after the date which said judge-elect is required to qualify."

(Underscoring ours.)

We would call your further attention to the case of State v. Heath, 132 S. W. (2d) 1001, in which the court stated:

"It was contended that 'the word "eligible", as used in Constitutions and statutes, concerning elections of office, means the capacity to hold the office at the time of the election, so that the subsequent removal of the disability will not remove the incompetency.' While there are two conflicting lines of authorities on this question in this country, this court held against this contention and decided that the Constitution and statute did not mean eligible at the time of election, but, instead meant eligible at the time of commencement of the term and of taking possession of the office. See C.J. 949, Sec. 58; 22 R.C.L. 403, Sec. 43; 88 A.L.R. 812 note; 24 R.C.L. 571, Sec. 16.* * *"

The court in the Heath case, from which the above excerpt is taken, went on to hold that "eligibility" meant "eligible at the time of commencement of the term and taking possession of the office." Under this holding, which was made November 3, 1939, a person who could not qualify for the office to which he had been elected, on the date of the commencement of the term of that office, was not "eligible" to hold the office.

Mr. Duncan R. Jennings

In answer to your first question, therefore, it is the opinion of this office that the party in the instant case cannot wait four months after the date of the commencement of the term of office to qualify for the office.

The answer to your first question makes it unnecessary to answer the other two questions. Since a person lacking the necessary qualifications at the beginning of the term cannot thereafter qualify, it may be assumed safely that he will not seek to be nominated or elected.

CONCLUSION

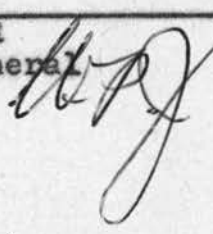
It is the opinion of this office that a person not eligible to hold an office on the day of the commencement of the term of the office, could not qualify for the office four months after the beginning of the term.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



HPW:hr

DEPARTMENT OF PUBLIC
HEALTH AND WELFARE:
CONVEYANCE OF RIGHT-OF-WAY:

The director of the Department of Public Health and Welfare has authority to convey to the State Highway Commission right-of-way needed for a state highway through real estate in which title is vested in said Director as trustee for the State of Missouri.

October 17, 1950

FILED NO. 45

Honorable W. Ed. Jameson
Director, Department of
Public Health and Welfare
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion by this department upon the question of whether or not the attached highway right-of-way deed is in proper form and within your authority to execute.

Laws of Missouri 1945, page 1464, Section 8759a provides as follows:

"The State of Missouri, and all departments, boards, commissions, bureaus, institutions, public agencies and political subdivisions thereof, holding title to or having an interest in real estate, or having administrative jurisdiction and control of real estate or other property, are hereby authorized and empowered to give, grant and convey to or for the use of the State Highway Commission of Missouri such rights-of-way or other easements and appurtenances in said real estate or property as may be necessary for the proper and economical construction or maintenance of state highways."

Laws of Missouri 1945, page 945, Section 10, provides as follows:

"Title to all state property, real and personal, assigned to, or held, occupied and controlled by the Department of Public Health and Welfare, and the various divisions thereof, in the performance and administration of its or their various powers and functions hereunder shall vest successively in each incumbent Director of Public Health and Welfare, as trustee, for and on behalf of the state of Missouri."

Hon. W. Ed. Jameson

Laws of Missouri 1945, page 945, Section 13 provides, in part, as follows:

" * * *The Cancer Commission of the State of Missouri, as established by Chapter 125, Revised Statutes of Missouri, 1939, as amended, is hereby assigned to the division of health in the department of public health and welfare."

We have been informed by you that the property conveyed by the deed is part of the real estate belonging to the Cancer Commission of the State of Missouri.

The form of conveyance is conventional except that it contains a relinquishment of right of direct access from your abutting property. You have informed us that this provision is satisfactory to you and is necessary in order to enable the highway department to build a limited access highway in accordance with its plans.

CONCLUSION

It is the conclusion of this department that by virtue of the authority of Laws of Missouri 1945, page 1464, you have authority to convey to the State Highway Commission of Missouri the right-of-way described in the enclosed deed, and that said deed is in proper legal form.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

SHERIFFS:

It is the duty of the sheriff of each county to collect, after receiving an order from the clerk of the County Court so to do, any tax assessed by said County Court upon any public theatrical or minstrel performances, shows and circuses or any other public exhibits in said county.

October 18, 1950

10/18/50



Mr. W. Don Kennedy
Prosecuting Attorney of
Vernon County
Nevada, Missouri

Dear Sir:

This office is in receipt of your recent request for an official opinion. You thus state your request:

"Sec. 15448, R. S. Mo. 1939, provides that the clerk of the county court, in order to collect license taxes on shows and circuses, makes a copy of the order of the county court and delivers it to 'the constables of each township in said counties where such exhibitions are usually had.' This order has the effect of an execution, and it is the duty of the constable to collect the tax. He is liable on his bond for his failure to do so.

"In Vernon County, a county of the third class, we have no constables. It has been customary to deliver the order mentioned in the statute to the sheriff. The sheriff, however, has failed to make collection; and I am unable to see that he is required by this section to make collection, or that he is liable on his bond for failure to do so.

"Is there any statute that fills in this gap? Or one that transfers to the sheriff the duties of the constable where there are no constables? The County Court here will appreciate your opinion on this question."

Senate Revision Bill No. 1116, passed by the 65th General Assembly of Missouri, now effective, states in part:

Mr. Don W. Kennedy

"Section 1. That section 15448, Chapter 119, Revised Statutes of Missouri, 1939; also section 15451 of an Act of the Sixty-third General Assembly, found at page 1729, Laws of Missouri, 1945, approved March 7, 1946, all relating to shows, amusement halls and public buildings, be and the same are hereby repealed to the same subject, to be known as sections 316.02 and 316.04 and to read as follows:

"Section 316.02 (15448). It shall be the duty of the clerks of said courts to make out and deliver a copy of said order to the sheriff of the county. Such copy, duly certified, shall have the force and effect of an execution against the property so exhibited or persons so exhibiting, and said sheriff shall be liable on his official bond for any default or neglect in collecting the same."

It will therefore be seen that the duties imposed upon constables by Section 15448 R. S. Mo. 1939, which section is now repealed by Senate Revision Bill No. 1116, are now laid upon the sheriff by Section 316.02 of said Senate Revision Bill No. 1116 quoted above.

CONCLUSION

It is the duty of the sheriff of each county to collect, after receiving an order from the clerk of the County Court so to do, any tax assessed by said County Court upon any public theatrical or minstrel performances, shows or circuses or any other public exhibitions in said county.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



HPW:hr

BONDS: Sheriff has discretion only to determine
SHERIFFS: pecuniary responsibility of surety on bail
CRIMINAL LAW: bond, but cannot determine who may be surety.
Refusal to allow responsible person to be
surety may be remedied by mandamus or suit
for false imprisonment.

October 27, 1950

11-1/50

Honorable Walter G. Kelly
Member
Missouri House of Representatives
9280 E. Breckenridge
Overland, Missouri



Dear Sir:

This is in reply to your request for an
opinion which we will reword for the sake of brevity.

"I would like to ascertain what discretion the Sheriff has in accepting bonds in criminal cases. It is his custom to only approve certain bondsmen, although others are fully qualified, upon the theory that he may accept who he pleases and that is within his discretion. Likewise, he requires that the bondsmen have double the amount of the bond.

"Would appreciate receiving an opinion from you based upon the above inquiry."

In reply to your inquiry we believe the following statutes are applicable:

Section 3965, R.S. Mo. 1939:

"When any sheriff or other officer shall arrest a party by virtue of a warrant upon an indictment, or shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, or if the case is a misdemeanor, such officer may take bail, which in no case shall be less than one hundred dollars, and discharge

Honorable Walter G. Kelly

the person so held from actual custody."

Section 3966, R.S. Mo. 1939:

"Sureties in recognizances in criminal cases and proceedings shall be residents of this state, and shall be worth over and above the amount exempt from execution, and the amount of their debts and liabilities, the sum in which bail is required; and the person or persons offered as sureties may be examined on oath in regard to their qualifications as sureties, and other proof may be taken in regard to the sufficiency of the same. The officer authorized to take any such recognizance is authorized to administer all necessary oaths in that behalf."

Section 3967, R.S. Mo. 1939:

"Where more than one person is offered as sureties, they shall be deemed sufficient, if in the aggregate they possess the necessary qualifications. But no recognizance shall be taken unless the court or officer authorized to take the same shall be satisfied, from proof and examination on oath or otherwise, of the sufficiency of the sureties according to the requirements of this and the preceding sections."

In a very early New York case, *People ex rel. Tully vs. Davidson*, 67 Howard's Practice Reports (N.Y.) 416, 1.c. 419, the Court held that the giving of bail constitutes a contract between the principal and his sureties, and the principal has a right to determine for himself whether he will assume the obligations of such a person or not. It cannot be imposed upon him against his will. * * * A prisoner is entitled to choose whether he will give any one else this dominion over him or will remain in the custody of the sheriff. * * * .

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In the case of State ex rel. Garbutt vs. Charnock, 141 S.E. 403, 56 A.L.R. 1094, the Court considered the question of the exercise of discretion in determining the pecuniary ability of sureties to perform, and at l.c. 1097, stated as follows:

"Were the sureties tendered pecuniarily able to fulfil the obligation? There is no question of their fitness otherwise. It is said that, in determining their ability to respond to the penal amount of the obligation, the clerk has discretion, which cannot be controlled by mandamus. It is quite true that the clerk exercises discretion in determining whether the sureties tendered are pecuniarily able to perform the obligation, if the condition be not performed according to the tenor thereof; but that discretion is not arbitrary and absolute. It must be reasonably and soundly exercised; otherwise, a clerk could always refuse to take unquestioned sureties, and successfully defend on the ground that he was exercising discretion, which could not be questioned. The result would be as pernicious as where excessive and impossible bail was required. The meaning of discretion generally is sound discretion. 'It must be governed by rule; it must not be arbitrary, vague, and fanciful, but legal and regular.' Rex v. Wilkes, 4 Burr. 2539, 98 Eng. Reprint, 334. See Rose v. Brown, 11 W. Va. 142.

"But, as we view the return, the nonacceptance of the sureties is not based on lack of their financial ability to perform, for their equities in the properties owned by them are far in excess of the penal sum of the recognizance (an averment supported by affidavits, and not attempted to be denied), but because

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there are liens which would be first in priority in case of sale by the state in satisfaction of the recognizance; not that the penal sum could not be realized, but because the liens would have precedence in case of sale by the state. This is not a sound reason on which rejection of the sureties can be based. It is fanciful and arbitrary. Fancied convenience is made to defeat a legal right to liberty. Under such a theory, a surety owning property worth \$1,000,000 would be refused, because of a lien thereon, however, small and inconsequential.

"Under the familiar principle that discretion in the performance of a ministerial duty, where its exercise has been unsoundly and capriciously exercised will be controlled by mandamus, we have concluded to direct the peremptory writ as against the clerk, and without costs. See State ex rel. Hoffman v. Clendenin, 92 W. Va. 618, 29 A.L.R. 37, 115 S.E. 583; State ex rel. Noyes v. Lane, 89 W. Va. 744, 110 S.E. 180."

(Underscoring ours.)

Thus, we see that a sheriff is performing a ministerial duty when taking bail and he may not act in an arbitrary and unreasonable manner.

He does not have discretion to determine who may serve as bondsmen. The only question that the sheriff determines is the pecuniary ability of the sureties.

In your request you mention that the sheriff requires bondsmen to have double the amount of the bond. This is not a provision of law and the sheriff may not make such a requirement. Section 3966 only requires that the surety be worth over the amount in which bail is required.

The right to furnish bail in a reasonable amount is guaranteed by Sections 20 and 21 of Article I, Constitu-

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tion of Missouri, 1945, which read as follow:

"That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

In discussing these sections the Supreme Court of Missouri in the case of State ex rel. Corella vs. Miles, 303 Mo. 648, at l.c. 651, said:

"Section 24, Article II, of the Constitution of Missouri, provides that any person charged with a felony, except in capital offense in certain cases, has a right to be released upon giving bail with sufficient sureties. It is a right of which a defendant cannot be deprived. (6 C.J. p. 953.)

"Section 25, Article II, of the Constitution of Missouri, provides that excessive bail shall not be required. The purpose of giving bonds is to secure the appearance of the defendant at trial, and when the Constitution forbids excessive bail it means that bail shall not be more than necessary to secure that attendance. (6 C.J. p. 989). * * * ."

Again, at l.c. 652, the Court said:

"The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates Section 24, Article II, of the Constitution. For that is

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saying the offense is not bailable
when the Constitution says it is."

In the event that the sheriff abuses his discretion in denying the right of persons in his custody to furnish bond with sureties of their own choosing, we believe that two courses are open for redress. In 35 Am. Jur. at page 54, the following rule is stated as to the use of mandamus to force the acceptance of sureties who are pecuniarily able to perform the obligation:

"* * * Thus, the power of deciding the sufficiency of the affidavit to hold a defendant to bail and the amount of bail is a part of the judicial power of the court, and mandamus will not lie to re-examine its decision. But after the right to bail has been judicially determined, and the amount fixed, the determination of the sufficiency of the sureties and the taking of acknowledgment may be purely ministerial, and not judicial. It is quite true that the officer exercises some discretion in determining whether the sureties tendered are pecuniarily able to perform the obligation, if the condition is not performed according to the tenor thereof; but that discretion is not arbitrary and absolute. It must be reasonably and soundly exercised. If it is not, and as a consequence the sureties are rejected, mandamus will lie to compel their acceptance."

In the case of Baker vs. Tener, 112 S.W. (2d) 351, the Springfield Court of Appeals ruled that mandamus would lie to correct an abuse of discretion in setting an appeal bond at such an amount so as to, in effect, abrogate the right of appeal. At l.c. 355, the Court said:

"It is the general rule that mandamus will lie where the inferior court re-

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fuses to exercise jurisdiction, or fails to exercise or perform some act requiring judicial discretion, but cannot be used to direct such inferior tribunal to exercise judicial discretion in any particular way. However, if there is a clear abuse of discretion by an inferior tribunal, then mandamus is the proper remedy to rectify the harm. * * * ."

Again, at l.c. 357:

"After reviewing the case, we are of the opinion that the bond fixed by the judge of the probate court of Newton county, in the sum of \$5,000 as a condition precedent to the appeal in the insanity proceedings filed against Nicholas Spangler was so excessive as to amount to an abuse of judicial discretion, and in effect abrogate respondent's right to appeal from the judgment of that court, and that therefore the writ of mandamus issued by the circuit court of Newton county was within the powers of that court, and that these powers, under the circumstances, were properly exercised."

Therefore, it would appear that the remedy of mandamus would be available in a case wherein the sheriff has abused his discretion in accepting sureties. In addition thereto, another remedy is available to those persons for whom bail has been refused by arbitrary and capricious action on the part of the sheriff. In 22 Am. Jur. at page 366, it is stated:

"It is the duty of an officer or other person making an arrest to take the prisoner before a magistrate with reasonable diligence and without unnecessary delay; and the rule is well settled that

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whether the arrest is made with or without a warrant, an action for false imprisonment may be predicated upon an unreasonable delay in taking the person arrested before a magistrate or upon a denial of the opportunity to give bond, regardless of the lawfulness of the arrest in the first instance. * * * ."

In the case of Harbison vs. Chicago, R.I. & P.Ry. Co., 37 S.W. (2d) 609, 79 A.L.R. 1, at l.c. 613, the Court said:

"The evidence tends to show that, after the search of the premises, the discovery of the intoxicating liquor, and the arrest of McCowan, under the search warrant by the deputy sheriff, defendant Filipczak requested and encouraged the deputy sheriff to lodge McCowan in jail and not permit him to give bond. Regardless of McCowan's guilt or innocence and regardless of the legality or illegality of his arrest, he had the lawful right to give bond. Const. art. 2, Sec. 24. The arrest was made at 11 o'clock in the forenoon. There was evidence that, as the sheriff and J. E. Kresse took McCowan to jail, they passed within 60 feet of the office of the justice of the peace who issued the search warrant; that McCowan was ready and able to give bond, so told the deputy sheriff, and requested that he be taken before the justice for that purpose; that they told McCowan they had no time to fool with him, denied his request, and lodged him in jail.

"It was the duty of the deputy sheriff to afford McCowan an opportunity to give bond, and, if he wrongfully denied him such opportunity his imprisonment thereafter was unlaw-

Honorable Walter G. Kelly

ful, and therefore false imprisonment
for which the deputy sheriff would be
liable. 25 C.J. 491, 495. * * * ."

(Underscoring ours.)

And, again, in Jackson vs. Thompson, 188 S.W. (2d) 853, the same rule was reiterated at l.c. 857:

"Regardless of Jackson's guilt or innocence and regardless of the legality or illegality of his arrest, it was the duty of the constable to afford plaintiff an opportunity to give bond and if he wrongfully denied him such opportunity his imprisonment thereafter was unlawful, and therefore, false imprisonment for which the constable would be liable. * * * ."


For a sheriff to arbitrarily refuse to approve a surety on a bond is to effectively deny a right guaranteed by the Constitution. The right to furnish bail has been very much before the public recently. A fair sample of the sacredness of this right was given by Justice Jackson on the United States Supreme Court when he ordered that the top Communists of this Country be permitted to furnish bail pending appeal of their conviction. While recognizing the possible harm that those persons were capable of doing, he reiterated the position that the fundamental rights guaranteed all those in this Country must be preserved.

CONCLUSION

Therefore, it is the opinion of this department that a sheriff has discretion only to determine the pecuniary responsibility of the surety but does not have discretion to determine who may be a surety on a bail bond. Redress for refusal to allow a responsible person to become a surety may be had by mandamus and by a civil action for false imprisonment.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

JOHN R. BATY
Assistant Attorney General

JRB:ir

BUREAU OF VITAL STATISTICS: Director shall determine extent and duration of a local registration district that becomes a part of a city, and local registrar continues to hold office until removed or succeeded by a qualified successor.

January 12, 1950

FILED: No. 49

Mr. Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri



I.

In response to your request for an official opinion upon the following proposition:

"Because of the changing situation in Clay County arising from the annexation of a portion of Clay County by Kansas City, Missouri, I feel that I must bother you more than necessary for opinions involving situations which arise from conflicts in the newly annexed territory.

"I would now like an official opinion from your office on the following proposition:

"Mrs. Beulah Kitchen of North Kansas City is the duly appointed local registrar for the Division of Health for District 72 which is Gallatin and Platte townships of Clay County. That portion of Clay County which will be annexed by Kansas City, Missouri on January 1st, 1950 lies entirely within this district 72. Who has authority and jurisdiction in this annexed territory to report certificates of births and deaths to the State Bureau of Vital Statistics, Mrs. Kitchen or the Registrar from the Bureau of Vital Statistics of Kansas City, Missouri?

"I think that the director of the Bureau of Vital Statistics in Jefferson City would be interested in this opinion since he has instructed Mrs. Kitchen not to file records for events occurring within the annexed territory. If you need further information

Mr. Robert G. Kirkland

concerning this question, please let me know and let me have your opinion at your earliest convenience."

we have considered the following matters.

II.

That Kansas City is attempting to annex a part of District Number 72.

A new Uniform Vital Statistics Act was enacted by the Legislature and became effective July 19, 1948. This Act may be found in Laws of Missouri, 1947, Vol. 2, page 237. Section 5 of this Act and also known as Section 9783.4 Mo. R.S.A. provides:

"The director shall divide the state from time to time into registration districts which shall conform to political subdivisions, or combinations thereof, or of parts thereof."

The term, director, means the director of the Division of Health of the State Department of Public Health and Welfare.

Prior to the enactment of the new Uniform Vital Statistics Act, Section 9762, R. S. Mo. 1939, provided:

"For the purpose of this article, the state shall be divided into registration districts, as follows: Each city and incorporated town shall constitute a primary registration district; and for that portion of each county outside of the cities and incorporated towns therein, the state board of health shall define and designate the boundaries of a sufficient number of rural registration districts, which it may change from time to time as may be necessary to insure the convenience and completeness of registration: Provided, that, in all counties having or which may hereafter have a population of two hundred thousand inhabitants and less than four hundred thousand inhabitants according to the last federal decennial census, such counties shall constitute the primary registration district."

This statute is no longer in effect so the territory in a city does not automatically become part of its registration district.

The Supreme Court of Missouri in the case of McKittrick v. Langston, 84 S.W.(2d) 131, held that under the provisions of Article II of Chapter 52, of the Revised Statutes of 1929 (now Article II

Mr. Robert G. Kirkland

of Chapter 57, of the Revised Statutes of 1939) which provides for the appointment of local registrars of vital statistics, it is clear that such officials are appointive state officers, and cited cases in support of such holding.

They also held that the local registrar continues to hold office until his successor is appointed and qualified.

Section 8 of said Uniform Vital Statistics Act provides:

"The director on the recommendation of the state registrar shall appoint local registrars * * * "

Since Mrs. Beulah Kitchen is now the duly appointed local registrar for the Division of Health and District Number 72 she will continue to be the local registrar of all that district until the director of the Division of Health creates a new registration district, or removes her under the power stated above. The fact that part of District Number 72 may become part of the city of Kansas City will not automatically remove Mrs. Beulah Kitchen because she is an appointed state officer serving the State of Missouri in reporting the births and deaths in all of District Number 72. She is paid by the county court of Clay County, Missouri in accordance with Section 32, of said Uniform Vital Statistics Act, Laws Missouri, 1947, Vol. 2, page 237.

It is true that this section also provides:

"In cities having a population of one hundred thousand or over, where health officers or other officials are conducting effective registration of births and deaths under local ordinances, such officers being continued as registrars in and for such cities as provided in this act, and being paid by such cities salaries for their official services, said officers shall not be entitled to nor have power to collect any fee provided for in this section, but such salaries shall be in full compensation also for their services as registrars: * * * "

But the question of who pays the registrar is not the controlling factor. The Director of the Division of Health has the power and duty to fix the territory to be served by her or any other local registrar.

CONCLUSION

It is, therefore, the opinion of this office that the Director

Mr. Robert G. Kirkland

of the Division of Health of the State Department of Public Health and Welfare shall determine who shall act as local registrar for that part of District Number 72, that becomes a part of Kansas City, Missouri, and until he changes the present territory for said district the present local registrar of District Number 72 shall continue to serve all of that District whether within or without the city limits of Kansas City, Missouri.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INSANE PERSONS:

County not liable for cost of commitment and maintenance of insane person unless said person was physically residing in county at time of commitment.

January 25, 1950

FILED 49

Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

This office is in receipt of your recent request for an official opinion. This request poses two questions, the first of which is thus stated by you:

"A young man who was a legal resident of the state of Missouri and continued to maintain his legal residence in the state of Missouri and the county of Clay went to New York City to attend school. While there he became mentally unbalanced and was committed to a State Mental Hospital for confinement and treatment. The state of New York desires to be relieved from providing for his care and treatment and to be compensated for their services in that regard to date. Is there any provision under Missouri law whereby either the State or the County can, should, or must compensate the state of New York for the services rendered in this regard?"

In this opinion we will proceed upon the assumption that this young man is indigent, since if he is not indigent the county would not under any circumstances be liable for or permitted to pay the cost of his commitment and maintenance.

Article 18, Chapter I, Mo. R.S.A. 1939, states the law in regard to the procedure involved in finding a person to be insane, in committing him to a state institution, and the liability for costs involved in this procedure and maintenance. Section 453 of the above article and chapter states:

"When any person shall be found to be

insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

This section has been construed in two cases, one of which, *Van Loo v. Osage County*, 141 S.W. 2d 805, holds that where a person is adjudged insane in the probate court and the costs cannot be paid out of the estate of such insane person, the county is liable for costs, and the fact that the probate court committed an insane person to the state hospital instead of ordering her to be held for disposition by county court, would not relieve county of its obligation to pay costs.

In the other case, *in re Thomasson*, App., 119 S.W.2d 433, the court held that where verdict in insanity proceeding was against respondent, respondent died, and thereafter court permitted informant, acting with another under appointment of probate court as administratrices of respondent's estate, to enter appearance of the estate, court had no jurisdiction to enter judgment against the estate for costs of the proceedings, since the insanity proceeding had abated and consequently could not be revived in the name of the estate.

Section 498 states:

"If any such person of unsound mind, as in the last preceding section is specified, shall not be confined by the person having charge of him, or there be no person having such charge, any judge of a court of record, or any two justices of the peace, may cause such insane person to be apprehended, and may employ any person to confine him or her in some suitable place, until the probate court shall make further orders therein, as in the preceding section specified."

Section 499 states:

"The expenses attending such confinement shall be paid by the guardian out of his estate, or by the person bound to provide for and support such insane person, or the same shall be paid out of the county treasury, upon the order of the county court, after the same shall be duly certified to them by the probate court."

Section 500 states:

"In all cases of appropriation out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same, and also the county may recover the amount of said appropriations from the estate of such insane person."

Section 501 states:

"If any insane person be admitted into the state lunatic asylum as a patient, the guardian shall pay for his support and expenses at such asylum, out of the estate of such ward; and if such insane person shall, at any time, come under the class of 'insane poor persons,' as specified in the law for the government of the state lunatic asylum and care of the insane, such person shall be supported and maintained at such asylum by the county in the manner provided by such law."

Laws of Missouri, 1945, Sec. 9328, page 907, states:

"The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto. Such probate court shall furnish the county court with a certified copy of the order finding the person to be an insane poor person and the order committing such person. The counties from which such insane poor person has been sent shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars (\$6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall

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die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

This Section 9328 has been construed in the case of Thomas v. Macon County, 175 Mo. 68. In that case the court held that:

"The county court is not authorized by its arbitrary will or unlimited discretion to send any insane poor person it may select to the asylum at the expense of the county, but the court must hold due proceedings upon a petition filed showing that the insane poor person is 'a citizen residing in the county' and other essential facts as prescribed by the statute, and there must be a trial of the facts and a judgment of the court thereupon. (Section 9323 to 9328 incl.) The county court has no authority under those statutes to send a person to the asylum or maintain one there at the expense of the county who is not a resident thereof.

"The sections above referred to contain the only provisions to be found in our statutes expressly authorizing the cost of keeping a patient in the asylum to be charged to a county and in each of those cases it requires that the person be a resident of the county and that the county court should take the prescribed action in the premises.

"Where, as in State ex rel. v. Cole County Court, 80 Mo. 80, all the facts within the purview of sections 4885 and 4887, above

mentioned, appear as matters of record, the county court will be required by mandamus to make the necessary orders to place the person in the asylum at the expense of the county. In that case the county court had previously taken such action under section 4140, Revised Statutes 1879 (now Sec. 4883, R. S. 1899) as was therein authorized to make the person in question a county patient. This court per NORTON, J., there said: 'We think it apparent from the above statutory provisions and the general law regulating asylums (2 R. S. 1879, p. 818) that it was the intention of the Legislature to cast the burden of supporting the insane poor upon each county where such insane poor have acquired a residence or settlement, and that when an insane person is sent from a county and is discharged from the asylum, he shall be deemed to be the county patient of such county for twelve months after such discharge, the language of the statute being that every patient in the asylum shall be deemed to be the county patient of the county first sending him till one year after his regular discharge.' The court was there speaking of a person sent to the asylum by the county court, and further commenting, said that it was the same policy indicated in the law regulating the support of the poor, wherein it was provided that no person shall be deemed an inhabitant within the meaning of the chapter who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such person. (Emphasis ours)

"From the statutes and decisions above referred to we find that provision is made for the maintenance of a person in the insane asylum at the expense of the county in the following cases:

"First. When the county court adjudges a person who is 'a citizen residing in the county' to be insane and insolvent and orders him to be sent to the asylum at the expense of the county. (Sec. 4867.)

"Second. When the county court certifies to the superintendent of the asylum that a person already there as a pay patient has become insolvent. (Sec. 4883.)

"Third. Where a person on trial for a crime is acquitted on the ground that he was insane at the time he committed the act, in which case if he remains insane the county court shall proceed with him as in a case arising under the first clause of this enumeration, except that there will be no inquiry in the county court as to his insanity. (Secs. 4885, 4887.)

"Fourth. When the convict becomes insane during his imprisonment and is sent to the asylum by order of the Governor, as in the case at bar. (Sec. 2666.)

"In the first three of these categories the county court is required to take action and pass judgment and when it has done so the patient is held in the asylum at the expense of the county. And, as was held in State ex rel. v. Cole County Court, above referred to, that, if the county court in a proper case should refuse to take action, it may be required by mandamus to do so. But of the 114 counties in the State against which is the mandamus to go? In the case just cited it went against the county court of Cole County because the insane person in that case was a resident of that county. No county court has jurisdiction to send a person to the asylum who is not a resident of the county and therefore could not be required by mandamus to do so."

It will be noted that in the above the court holds that the county is liable for the costs of maintaining an insane person in a state institution if the person is "a citizen residing in the county."

In the instant case the person under consideration was a citizen of Clay County, Missouri, but at the time of his commitment as an insane person in New York he was not, obviously,

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residing in Clay County, Missouri.

We would call your further attention to Chapter 51, Article 2, Section 9356 R. S. Mo. 1939, this chapter and article dealing with state eleemosynary institutions. The sections immediately preceding Section 9356 discuss the admittance and maintenance of patients in state hospitals. Section 9356 reads:

"No person shall be entitled to the benefit of the provisions of this article as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, as provided in sections 9348 to 9352, inclusive, of this article. Every patient in a state hospital shall be deemed to be the county patient of the county first sending him till one year after his regular discharge from the hospital."
(Emphasis ours.)

We also call your attention to the two following excerpts from cases:

"Term 'resided' and term 'residence,' within statutes relating to poor relief, refer to actual residence as distinguished from legal or technical residence or domicile (Comp. Laws 1913, Secs. 14, 2501, 2515-2517). City of Enderlin v. Pontiac Tp., Cass County (N.D.) 242 N.W. 117, 122."

"Rev. St. 1919, Sec. 11140, Mo. St. Ann. Sec. 9212, p. 7084, requiring school directors to enumerate school children 'resident' in their district between April 30 and May 15 means children residing in the district at that time, 'residence' being used to mean merely present place of abode temporary or permanent as distinguished from 'domicile,' meaning permanent home. State ex rel. Logan v. Shouse, Mo., 257 S.W. 827, 828."

It is our belief that the above substantiates our previous findings that before a county is liable for the costs of commitment and maintenance of a person in a state hospital that the person must have been residing in the state at the time of his commitment.

All of the above law cited, and all of the cases cited construing this law, relate to situations in which the county is liable for the costs of finding a person insane and for the costs of maintaining such person in a state institution, where the insane person was residing in the county in which he was found to be insane, and in which situations he was confined in a Missouri institution. Not any of the law or the cases construing the law relates to a situation in which a Missouri citizen was committed and maintained in another state. In view of this fact it is our opinion that neither the county court of Clay County nor the State of Missouri would be authorized to use county or state funds to pay New York for the costs of commitment and maintenance in the instant case, or could be compelled by New York to do so, since Missouri law makes no provision for such an expenditure of county or state funds.

Your second question is:

"Further, is there any provision in the law of the state of Missouri which makes any provision for returning this patient to a State of Missouri institution for confinement and treatment and the payment of expenses in so doing and the authorizing of any officer to do such?"

We find no Missouri law which would authorize the action contemplated above.

CONCLUSION

1. It is the opinion of this department that neither a county in this state nor the state itself is authorized to or could be compelled to pay to another state the costs of commitment of an insane person, or the maintenance of such person in an institution of such other state, who is a citizen of a Missouri county but who at the time of his commitment was residing in such other state.

2. It is the further opinion of this department that there is no provision in Missouri law authorizing the removal of such a person to a Missouri institution and the payment

Hon. Robert G. Kirkland

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of the expenses involved in so doing by a Missouri county or by the state.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATE COURTS: County wherein Magistrate Court is held is under a duty to furnish to the said Magistrate Court the facilities necessary for the holding of Court and the administration of the Court held in such county.

February 3, 1950

2/6/50

Hon. Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. Kirkland:

We have your recent letter requesting an official opinion of this department. Said opinion request reads, in part as follows:

"Please furnish this office with an official opinion on the following question:

Is it compulsory that the County Court in a third class county issue a warrant to pay for law books ordered by and for the Magistrate Court of that county, the said law books being directly connected with the business and functions of the Magistrate Court?"

Section 7, Laws of Missouri, 1945, page 807 (Sec. 2811.307, Mo. R.S.A.) is the only statute which specifically provides for payment by the city or county of the necessary office expenses of the Magistrate Courts. Said section provides as follows:

"At the expense of the county the county court, or in the City of St. Louis the board of aldermen by ordinance, shall provide the court and its divisions and officers with proper court rooms and offices at one place in the city, and for the proper care thereof, and with heat, light, furniture, furnishings, office equipment, filing cabinets, typewriters, stationery, office supplies and proper books of account and record, dockets and printed forms of writs, and

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and whatsoever else may be necessary for the proper conduct of the business of the court."

The above quoted statute applies only to the City of St. Louis. However, the fact that a specific statute was enacted by the legislature for the purpose of declaring specific supplies and services necessary for the proper conduct of the business of the Magistrate Courts of the City of St. Louis does not preclude the counties from having the duty of paying the costs of supplies and services necessary for the proper conduct of the business of said Magistrate Courts in counties of the State outside the City of St. Louis.

In the case of Rinehart v. Howell County, 153 S.W. (2d) 381, the Supreme Court of Missouri in discussing the contention that since a statute provided that stenographers of prosecuting attorneys in certain counties should be paid by the county, and since no provision was made by statute for payment of such stenographers in other counties, the result must be that where no statute authorized payment by the county, the county was not liable therefor, said at l. c. 383:

"Appellant's statutory citations constitute legislative recognition of the propriety of expenditures for stenographic services in the discharge of the present-day duties of prosecuting attorneys in the communities affected--an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public. Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. * * * *"

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Magistrate courts are courts of record, see Section 19, Laws of Missouri, 1947, page 241 (Sec. 2811.119 Mo. R. S.A.) and as such have the same general powers and authority of all courts of record unless such general powers and authority have been specifically withdrawn by an appropriate statute. Hence, statutes relating to Courts of Record in general should be read in conjunction with the statutes relating to Magistrate Courts, Laws of Mo. 1945, Section 1, page 806; (Sec. 2034, Mo. R.S.A.) provides as follows:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

The above quoted statute is similar to, though more comprehensive than Section 14, Laws of Mo. 1945, (Sec. 2811. 114 Mo. R. S. A.) page 765, which provides as follows:

"Every magistrate may hold court for the trial of all causes of which he has jurisdiction as often as may be necessary to meet the needs of justice, and may hold such court on any day, except Sunday, on which any cause may be set for trial, or any cause adjourned; and when so required the sheriff shall be present in person or by deputy and attend on said court."

By application of the two above quoted statutes to the Magistrate Courts it becomes apparent that the sheriff or his deputy must be present in said court and attend on said court whenever required to furnish stationery, fuel and other things necessary for the use of the court whenever ordered by the court. The words "whenever ordered by the court" and "attend on said court" are, in our opinion, capable of only one construction, namely, that the court shall decide what is necessary for the proper conduct of its business and the court will then order the sheriff to provide the same to it. This construction is further substantiated by Section 2035, R. S. Mo. 1939, which provides for the auditing and certification for payment of such accounts by the court as follows:

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"The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

And also by the case of State of Mo. ex rel. W. B. Hensick v. A. J. Smith, Auditor, 5 Mo. App. 427, wherein the court discussed such power and authority of the court under an early revision of Section 2035, R. S. Mo. 1939, which is the same in substance as the present statute. In this case the court said, at l. c. 429:

"* * * * The general law directs (Wag. Stat. 431, sec. 4) that all accounts for expenditures accruing in courts shall be paid out of the treasury of the county in which the court is held, in the same manner as other demands, and (Wag. Stat. 424, secs. 41, 42) shall be audited and adjusted by the court in which the services were rendered. That tribunal has the means of determining the correctness of the account, as to which the auditor can know nothing; and to that tribunal alone have the people delegated the power of determining what expenditures are necessary to carry on, with efficiency and decorum, the public business of the court. * * * * * To hold otherwise would be to say that the people have committed to the auditor the power of suspending the session of any court in the city at his pleasure, which is manifestly absurd. * * * * *"

Substantially to the same effect, see State ex rel. McNeil v. St. Louis County Court, 42 Mo. 416, wherein the court said at l. c. 500:

"* * * * The general law directs all such accounts to be audited, adjusted, and certified for payment by the court in which the services are rendered and the articles furnished. Such tribunal is presumed to have the means of determining almost with positive certainty as to the correctness of the items of such an account."

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What necessity can be shown for requiring a claim thus audited and allowed to undergo an examination by the auditor? It will not be pretended that a claim for similar services in the County Court itself would have to pass through the hands of the same officer before the County Court would be authorized to order a warrant for its payment."

From the foregoing quoted statutes and cases it follows that it is for the court along to determine what things are necessary for its use and then to order the sheriff to furnish the same to the said court and after such things are furnished the court shall audit and adjust the account, then certify the same for payment.

Provision for the ultimate payment of the aforementioned accounts is made by Section 2102, Mo.R.S.A. (Reenacted Laws of Mo. 1945, page 812) as follows:

"All expenditures accruing in the circuit courts, county courts, magistrate courts, and probate courts, except salaries and clerk hire which is payable by the state, shall be paid out of the treasury of the county in which the court is held in the same manner as other demands."

Therefore, as the above statute requires that all expenditures accruing in the circuit courts, county courts, magistrate courts and probate courts, except salaries and clerks hire, be paid out of the treasury of the county in which the court is held, in the same manner as other demands, it is apparent that all expenditures made by the magistrate court in the carrying on of its duties and business as a magistrate court must be borne by the county wherein the court is held.

The fact that the magistrate in the instant case has not complied with all the preliminary requirements before taking it upon himself to order the law books here involved would not of itself give rise to an estoppel against the said magistrate so long as the magistrate acted in good faith in determining that said law books were necessary for the proper conduct of the business of said magistrate court. A question of this nature was determined in the case of *Buchanan v. County of Ralls*, 283 Mo. 10, wherein the court held such question to be a question of fact, holding at l. c. 17:

"The evidence as shown by the record before us does not, in our opinion, justify an instruction on the theory of estoppel, nor

Hon. Robert Kirkland

upon the necessity of a demand by respondent upon appellant that it should supply her with a suitable office, before she was justified in renting an office elsewhere. It seems that all parties were familiar with the situation. No one was misled. * * * * *

It will be noticed that the above statutes and authorities provide that the county wherein such court is held shall pay all expenditures accruing in the Courts of Record of said county when such expenditures are incurred by said court for those things which are necessary to enable the court to carry on with efficiency the public business of the court; and that the courts alone have the power of determining what expenditures are necessary for the court to so carry on the business of the said court.

CONCLUSION

It is therefore the opinion of this department that a county court in a county of the third class is under a duty to issue a warrant to pay for law books ordered by and for the Magistrate Court of said county, when said law books are necessary for the proper and efficient transaction of the business of said court.

Respectfully submitted

Philip M. Sestric

PHILIP M. SESTRIC

Assistant Attorney General

APPROVED:

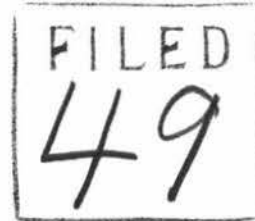
J. E. TAYLOR
ATTORNEY GENERAL

FMS:A

ELECTIONS: Clay County Court has no jurisdiction over that part of Clay County annexed to Kansas City January 1, 1950, insofar as special referendum election, April 4, 1950, is concerned.

February 24, 1950

FILED NO. 49



Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"Does the Clay County Court have the right to select and set up polling places, select judges and clerks for the same, and in general conduct the election for the April road referendum election in that portion of Clay County allegedly annexed to the city of Kansas City as of January 1, 1950?"

On February 23, 1950, the Supreme Court handed down its decision in the case of State ex inf. Taylor v. City of North Kansas City. Such opinion was written by Conklin, J. and concurred in by the other six judges, Leedy, J. concurring in a separate opinion.

The court in its opinion said in part:

"Therefore, we further hold that relator (Kansas City, Missouri) by its said effective amendment of its city charter to so extend its city limits northward into Clay County, Missouri, thereby acquired, effective as of January 1, 1950, and it now has exclusive municipal jurisdiction in and over all of that portion of Clay County, Missouri, set out and

February 24, 1950

particularly described by metes and bounds in its said charter amendment as being the area in Clay County relator proposed to be annexed to its city limits, all as the same appears and is now described in Ordinance No. 10,349, passed by the City Council of Kansas City, Missouri, and approved by its Mayor, September 3, 1946."

* * * * *

"The writ of ouster as prayed by relator against respondent, in the information filed herein, is ordered issued and made permanent."

While it is true that under Rule No. 1.19 of the Supreme Court of Missouri, a motion for a rehearing may be filed within fifteen days after the date of the filing of the opinion in this case, and while it is true that this case may be carried to the Supreme Court of the United States, until such time as the opinion in this case is withdrawn, modified or reversed by the Supreme Court of Missouri or the Supreme Court of the United States, laws relating to Kansas City do relate to that part of Kansas City annexed January 1, 1950.

Section 12096, Revised Statutes of Missouri, 1939, provides as follows:

"In all cities of this state now having, or which hereafter may have three hundred thousand inhabitants and not over seven hundred thousand inhabitants, there shall be a registration of all qualified voters, and the registration of voters and the conduct of elections held in such cities shall be governed by the provisions of this article and be subject to the general election laws of this state, so far as the same are not inconsistent or in conflict herewith."

Under the provisions of this section the complete control of elections held in Kansas City is governed by the provisions of Article 23, Chapter 76, Revised Statutes Annotated. Since this is true the election will be conducted

Honorable Robert G. Kirkland

February 24, 1950

by the Board of Election Commissioners of Kansas City, Missouri, and the Clay County Court will have no right to set up polling places, select judges and clerks or do any other acts necessary for the conduct of such election.

CONCLUSION

It is the opinion of this department that the Clay County Court does not have the right to set up polling places, select judges and clerks for the same or in any way conduct the special referendum election to be held April 4, 1950, in that part of Clay County annexed to Kansas City, January 1, 1950.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS:

POLITICAL COMMITTEES:

Candidates for committeeman and committeewoman in that part of Kansas City located in Clay County will file from the township in which he or she lives.

April 24, 1950

4/25/50

Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"This office requests for the use of the County Clerk of Clay County an official opinion interpreting Section 11573, R. S. Mo. 1939 in view and in connection with the present physical situation in Clay County. In other words, the County Clerk wants to know for what portion of the county or for what portion of the city of Kansas City in Clay County candidates file for committeeman and committeewoman, and whether or not such candidates are required to pay a fee of five dollars upon such filing."

You informed us further that that part of Kansas City which is in Clay County occupies only a part of a township in Clay County and that that part of Kansas City in Clay County has been made a part of two wards of Kansas City located in Jackson County.

Section 120.77 (11572) House Bill 2063, 65th General Assembly, provides as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the

April 24, 1950

case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county of which such voting precinct or district is a part. Any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 11550, and in all counties in this state now or hereafter containing a city of the first class, by also paying the sum of five dollars to the treasurer of the county committee of the party on whose ticket he or she seeks election."

Section 11579, Revised Statutes of Missouri, 1939, provides as follows:

"The word 'county' as used in this article shall include the several counties of this state and the city of St. Louis, and the word 'precinct' and the words 'election districts' shall include and refer to wards or townships as the case may require, but shall not apply to any subdivision less than a ward within any city subdivided into wards, or to any subdivision less than a township in any county."

Since no separate wards have been established in that part of Kansas City located in Clay County, it is our view that Section 120.77, House Bill No. 2063 quoted supra, governs in this case. It is to be noted that the only requirement in Section 120.77 as to the payment of the filing fee for committeemen or committeewomen relates to counties containing a city of the first class and that Clay County does not contain such a city. Therefore, a person resident in that part of Clay County annexed to Kansas City files for the office of committeeman or committeewoman from the township in which he or she lives, and no filing fee is required.

Conclusion

It is the opinion of this department that a person who

Honorable Robert G. Kirkland

April 24, 1950

lives in that part of Kansas City located in Clay County who wishes to file for the office of committeeman or committeewoman files for such office from the township in which he or she lives.

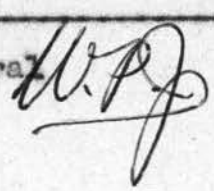
It is further the opinion of this department that no filing fee is required when filing for the office of committeeman or committeewoman from a township in Clay County.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General



CEB:lrt

INSANE PERSONS: The burden of supporting the insane poor
COUNTY LIABILITY: rests upon the county in which insane poor have
acquired a residence.

May 9, 1950

Filed: #49

Honorable Robert Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

I.

This will acknowledge receipt of your request for an official opinion from this department, which request is as follows:

"On March 9, 1950 a resident of Clay County, Missouri, who resided in that portion of Clay County heretofore annexed by the city of Kansas City, was adjudged insane and committed to State Hospital #2 by the Probate Court of Clay County. Prior to that date, but subsequent to the date of the filing of the information against the alleged insane in the Probate Court, the alleged insane was ordered restrained by the Clay County Probate Court in the General Hospital in Kansas City because of his violent condition. The city of Kansas City has now billed the County Court for payment for care of this patient from March 1 to March 9, 1950. Since the alleged insane at that time was a resident both of Clay County and of the city of Kansas City, is the Clay County Court liable for this bill?"

II.

We presume, for purposes of this opinion, that the person adjudged to be insane is a poor person.

Section 9590, R. S. Mo. 1939, provides as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 9591, R. S. Mo. 1939, defines poor persons as follows:

Hon. Robert Kirkland

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

The above sections have been re-enacted by Senate Revision Bill No. 1061(1949 Revised Statutes).

Section 9328, R. S. Mo. 1939, as amended, Laws 1945, page 905, and re-enacted by Senate Revision Bill No. 1059, provides that the county shall pay for the maintenance of the insane poor committed to the state hospital.

Section 10914, R. S. Mo. 1939, of the County Budget Law provides that the first class of estimated expenditure for each year shall be for the care of paupers designated by lawful authority to be insane (in state hospital).

Section 499, R. S. Mo. 1939, re-enacted by Senate Revision Bill No. 1131, provides as follows:

"The expenses attending such confinement shall be paid by the guardian out of his estate, or by the person bound to provide for and support such insane person, or the same shall be paid out of the county treasury, upon the order of the county court, after the same shall be duly certified to them by the probate court."

The Supreme Court of Missouri said in the case of Yarnell v. Cole county court, 80 Mo. 80, 1.c. 84:

"We think it apparent from the above statutory provisions and the general law regulating asylums, (2 R. S. p. 818,) that it was the intention of the legislature to cast the burden of supporting the insane poor upon each county where such insane poor have acquired a residence or settlement * * *."

The Supreme Court of Missouri in the case of State v. Smith, 96 S.W.(2d) 40, 1.c. 41, said:

"We are of the opinion that it is the duty of a county to support the poor who are within its boundaries. Section 12950, R. S. Mo. 1929(Mo. St. Ann. Sec. 12950, p. 7474), is as follows: 'Poor persons shall be relieved, maintained and supported by the county of which they are

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inhabitants.'

"An examination of the Revised Statutes of Missouri 1929 clearly shows that poor relief is a "public purpose" and a governmental duty because by sections 12950 and 12952 (Mo. St. Ann. Secs. 12950, 12952 (p. 7474)), counties are authorized to spend money in support of the poor; by section 9986 (Mo. St. Ann. Sec. 9986 (p. 8022)), a county pauper fund is provided: by section 12058 and 13942 (Mo. St. Ann. Secs. 12058, 13942 (pp. 6410, 4240)) county poor houses and county hospitals are maintained; section 9697 (Mo. St. Ann. sec. 9697 (p. 7349)) gives authority to educate poor children that are blind or deaf; section 12961 (Mo. St. Ann. sec. 12961 (p. 7476)) directs the county court to set aside, out of its annual revenues, a definite sum for the support of the poor; article 1, chapter 90, creates a state board of charities and defines its functions: section 12930 (Mo. St. Ann. Sec. 12930, p. 7465) requires this board to supervise public relief to the poor. * * *

"The good of society demands that when a person is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood," he is entitled to be supported at the expense of the public. "It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important." "So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper." An able-bodied man, who can, if he chooses obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men." 21 R.C.L. 705, 706. It necessarily follows that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support, is entitled to public relief.

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'Jennings v. City of St. Louis, 332 Mo.
173, 58 S.W.(2d) 979, 981, 87 A.L.R. 365."

The Supreme Court of Missouri in the case of City of Joplin
v. Jasper County, 161 S.W.(2d) 411, 1.c. 413, said:

"In the instant case no question is raised as to the validity, constitutional or otherwise, of any statute but a declaration is sought as to the rights and duties of the parties in caring for the poor and especially the sick poor of Jasper County who are also residents of the City of Joplin. In addition to the statutes relied on by the City, Secs. 9590-9593, R. S. Mo. 1939, relative to the county poor it appears there are several other laws relating to the same subject. Article 1, Chapter 57, Secs. 9733-9759, R. S. Mo. 1939, Mo. R.S.A. Secs. 9733-9759, deals with the State Board of Health and its duties to the sick as well as the poor. Article 6, Chapter 54, R. S. Mo. 1939, Mo. R. S. A., Secs. 9550-9560, deals with the support of needy mothers and dependent children, while Article 7, Chapter 54, R. S. Mo. 1939, Mo. R.S.A. Secs. 9561-9568, relates to funds for dependent women in certain counties. Article 3, Chapter 51, Secs. 9360-9362, R.S. Mo. 1939, Mo. R.S.A. Secs. 9360-9362, deals with city and county hospitals for the insane, * * * "

The Supreme Court in this case did not decide the respective duties and rights between the City of Joplin and the county of Jasper in regard to their respective poor persons. The court pointed out that a suit could be filed to determine an actual case or issue as to the liability of either for the support of actual cases of persons in need, but that this case did not present issues ripe for determination.

If the City of Kansas City filed suit against Clay county to recover and charge for the care of the insane person temporarily restrained in their general hospital, then a real issue would be presented to the court to determine.

We can find no statute making it the duty of the city of Kansas City to support its insane poor. Furthermore, the Clay county probate court ordered the person temporarily confined in the General

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Hospital in Kansas City as part of the proceedings in that court. The probate court had authority to make this order under the provisions of Section 9336, as re-enacted Laws Mo. 1945, page 905.

CONCLUSION

It is, therefore, the conclusion of this department that Clay county is liable for the hospitalization of its insane poor in the General Hospital in Kansas City, Missouri, when ordered temporarily confined therein by the Probate Court of Clay County, even though such insane poor are also residents of the city of Kansas City, Missouri.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw

MAGISTRATE COURTS:
FEES:
PROSECUTING ATTORNEYS:

Several questions relating to the assessment,
and collection of fees in the magistrate
courts, and the certification of fee bills
in connection therewith.

Filed: #49

June 16, 1950.



Mr. Robert G. Kirkland,
Prosecuting Attorney,
Clay County,
Liberty, Missouri.

Dear Mr. Kirkland:

We have your recent request for an opinion from this office.
Your letter of request is as follows:

"Please furnish this office for the use of the
Clerk of the Circuit Court with an official
opinion on the following propositions:

"1. Is the Clerk of a Magistrate Court entitled
to charge as costs in the case any fee for making
up and certifying transcripts of the record in
cases, either criminal or civil, appealed from
the Magistrate Court to the Circuit Court (that
is, over and above the \$2.50 or \$5.00 taxed as
magistrate fee)? What is the proper fee? Must
such fee, if any, be collected from the appellant
at the time the appeal is taken or must it be taxed
as court costs and collected by the Circuit Clerk?

"2. In all criminal cases sent from a Magistrate
Court to the Circuit Court, whether on appeal, or
after the defendant has been bound over following
preliminary hearing, or for costs only, must the
fee bills sent with the cases by the Clerk of the
Magistrate Court be certified to by the Prosecuting
Attorney before they can be paid or collected by
the Clerk of the Circuit Court?"

Your first question is whether the clerk is entitled to any fee
for certifying the transcripts of the record on appeal to the Cir-
cuit Court in addition to the \$2.50 provided for criminal cases,
and the \$5.00 for civil cases.

Laws 1947, Vol. 1, page 240, provides in part as follows:

"A fee of five (\$5.00) dollars shall, be allowed

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the magistrate in each civil proceeding, general or special, instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county or other political subdivision the party commencing the same shall pay to the clerk of said court such magistrate fee of five dollars (\$5.00). The fees herein provided shall be charged against the losing party, and if recovered from said party the same shall be repaid to the party making the deposit of such fee. * * *

Laws 1947, Vol. 1, page 488, provides in part as follows:

"(1) There shall be charged and collected by the clerks of the magistrate courts fees for certain of their services as follows:

"For issuing each execution in civil cases	\$0.35
For each renewal of execution in civil cases25
<u>For making certified copies on appeals or certiorari, in civil cases, for each 100 words</u>	.10
For copies of records, pleadings or instruments on file in the office of such clerks, for every 100 words and figures10

"(2) In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents (\$2.50) shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto."

(Underscoring ours)

It appears, then, that the clerk is entitled to collect a fee, in civil matters, for his work in preparing and certifying transcripts for appeal.

In regard to costs in criminal cases, this office ruled in an opinion dated June 20, 1947, addressed to Honorable Forrest Smith, then State Auditor, as follows:

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"It is, therefore, our opinion that the magistrate should not charge and collect the fee provided for in Section 8459, R.S. Mo. 1939, in addition to the \$2.50 magistrate court fee provided for in Senate Bill No. 108, enacted by the 64th General Assembly, which is now in effect, and, further, that the \$2.50 magistrate court fee shall be the only fee collected in criminal proceedings in the magistrate court for services performed by the magistrate or by the clerk of the magistrate court."

(Underscoring ours)

You next ask if the additional fee should be collected at the time the appeal is taken, i.e., in the magistrate court, or should it be collected as costs in the Circuit Court?

At this time we again call your attention to Laws of 1947, Vol. 1, page 488, supra, which provides for the collection of additional fees in civil cases in part as follows:

"There shall be charged and collected by the clerks of the magistrate courts fees for certain of their services as follows:

"For making certified copies on appeals or certiorari, in civil cases for each 100 words \$0.10."

It is therefore clear that the fee should be collected from the appellant at the time the appeal is taken, by the clerk of the magistrate court.

Your final inquiry relates to the duty of the prosecuting attorney to certify fee bills (in criminal cases) sent from the magistrate court to the circuit court

Section 4237 R.S. Mo. 1939 provides as follows:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which

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charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

The "next preceding section" is Section 4236 R.S. Mo. 1939, as follows:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

(Underscoring ours)

In a recent case (Cramer v. Smith, 168 S.W. 2d 1039) the Supreme Court of Missouri held as follows, 1.c. 1041:

"Referring to Section 4236, supra, it will be seen that it is the duty of the clerk to tax the costs and issue fee bills in criminal cases when the same 'shall have been determined or continued generally.' The verb determine 'has been variously defined, the three principal senses being to ascertain, to bound, and to terminate.' 26 C.J.S., Determine, pp. 1257, 1258. 'To put or set an end to; to bring to a close; to terminate.' (Webster's International Dict.) In Hanchett Bond Co. v. Glore, 208 Mo. App. 169, 232 S.W. 159, 160, it was said, 'The term "determination" may "properly,

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and according to legal use as well as according to its derivation, signify the coming to an end in any way whatever * * * more specifically the final result of a proceeding." 18 C.J. 983.' (Italics, the present writer's.) We hold the term 'determined' was used in Section 4236, in the sense of terminated or brought to an end, finished (26 C.J.S., Determine, p. 1259) - and this not merely insofar as the trial court might have been presently concerned, but as implying a finality. As thus construed, this provision harmonizes with the scheme of the statute for the certification, allowance and payment of criminal costs through the medium of a 'complete' fee bill. * * * "

It is clear from the above that there is no obligation on the Prosecuting Attorney to certify a fee bill until the cause has been finally determined, which is not the case in the instances you set out. The "fee bill" sent from the Magistrate Court to the Circuit Court is not really a fee bill within the meaning of Section 4236, but is in effect merely a statement of costs, which the fee bill, when made out by the Circuit Court and certified by the Prosecuting Attorney, includes.

CONCLUSION

It is, therefore, the opinion of this office that the Magistrate Clerk is entitled to an additional fee for making up and certifying the transcript in civil cases, as provided in Laws 1947, Vol. 1, page 488. Such fee should be collected by the Magistrate Clerk at the time the appeal is taken.

It is also our opinion that a Prosecuting Attorney should not certify the statement of costs sent from the Magistrate Court to the Circuit Court, but should certify the fee bill as drawn by the Circuit Clerk.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
Attorney General.

BOARD OF ELECTION COMMISSIONERS: It is within the power of the
COUNTIES: Legislature to provide that the
expenses of a board of election
commissioners of a city located
in two counties shall be paid
by both such counties.

September 13, 1950

FILED NO. 49



Honorable Robert G. Kirkland
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Kirkland:

This will acknowledge receipt of your letter of recent date, in which you request an opinion of this department on the following proposition:

"House Bill 2055 passed at the last session of the Legislature and effective April 14, 1950, provided for the payment of expenses of elections conducted in and by large cities lying in two counties. This statute appears to give the Board of Election Commissioners of the city authority to issue warrants drawn on the treasury of the respective counties. Can an outside agency, unrelated and unconnected to the county government, be given the power and authority to draw warrants on the county treasury?"

Section 117.01 of House Revision Bill No. 2055 of the 65th General Assembly of Missouri defines "county" as follows:

"(b) 'County' shall mean any county or counties in which any city to which this article applies is situated."

Section 117.17 of said House Revision Bill No. 2055 provides as follows:

"Said board of election commissioners shall audit all the claims of judges and clerks of elections, and all other claims under this article, and shall draw a warrant therefor upon such county or counties and/or city treasury, as the case may be."

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Section 117.145 of said House Revision Bill No. 2055 provides as follows:

"When any such city shall be located in more than one county, all such salaries and expenses shall be paid one-half out of the city treasury and one-half out of the combined treasuries of all such counties with each county paying in proportion to the population of that part of each such city located in such county according to the last preceding federal decennial census."

The Supreme Court of Missouri in the case of State ex rel. Lynn v. the Board of Education of the City of St. Louis, 141 Mo. 45, 41 S.W. 924, considered the question of whether or not the City of St. Louis had to pay the cost of a school election held in said city. The court held (Mo.) 1.c. 48, 49, 50:

"The contention of the relator is that inasmuch as the Constitution and laws of this State authorize a separate taxation for school purposes, the costs of this election should be paid out of the school fund and not out of revenues raised for municipal purposes only, and further that the legislature has no constitutional power to require the city of St. Louis to pay the expenses of this school election. If the last contention is not well made, then the answer to relator's first contention is simply that the legislature has thought proper to provide for the expenses of the election of the board of education of the city of St. Louis out of a fund and by a way not approved by his judgment, if we read aright the act creating the respondent board of education and the election laws of 1895 to which it refers in section 6 thereof.

"Just what constitutional provision would be violated, if it is determined that the legislature has provided that the expenses incurred by the election of the directors of the board of education of the city of St. Louis shall be defrayed by the city of St. Louis out of its general revenue, is not named or designated by the relator; but be that it may, the constitutional power of the legislature to authorize by law a tax to be levied by the municipal authorities upon property within its limits to pay the expenses of all elections held therein ought not now to be a question in this State since the ruling of this

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court in the case of The State ex rel v. Owsley, 122 Mo. 68. In that case this court, construing section 1011, Revised Statutes 1889, containing a similar provision to section 91 of the present election law, upon which respondent relies to throw the costs of this election upon the city, held that the legislature had the constitutional right to require the city to pay the expenses of holding all elections, whether national, state, or municipal, held in such city, out of revenue raised by the city.

"The legislature has control over the revenues of the city as over that of the county and State, and can direct by law that the expenses of elections held in a municipality, for the election of school directors, or for local purposes, shall be paid out of the treasury of the municipality from taxes levied and collected by municipal authorities."
(Underscoring ours)

The Supreme Court of Missouri in the case of State ex rel. Webster Groves Sanitary Sewer District v. Smith, 87 S.W. 2d. 147, 337 Mo. 855, considered the question of whether or not the city of Webster Groves had to pay the cost of holding a sewer bond election for said sewer district, and in said case said, (S.W.) 1.c. 153:

"It is next contended that the act is unconstitutional because it authorizes the expenditure of county funds in aid of sewer districts in violation of section 46 of article 4 of the Constitution of Missouri.

"Section 5 of the act (Mo. St. Ann. Sec. 11071e-5, p. 7431) provides that, after the incorporation of a sewer district by the circuit court, it shall be the duty of the circuit court to order the county court or the election commissioners, if there be election commissioners in the county, to call and hold an election within sixty days after the issuance of the order for the purpose of electing a board of trustees and voting on a proposition to incur indebtedness by the district for the construction

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of district sewers. Section 7b (Mo. St. Ann. Sec. 11071e-9, p. 7431) provides that the expense of elections held prior to the issuance of bonds and the levy of taxes by the district shall be paid out of the general revenues of the county. This section also provides that all indebtedness incurred by the district prior to the issuance of bonds may be paid out of funds received from the sale of bonds. It is the payment of these election expenses by the county which furnishes the grounds for this objection to the act. Relator contends that section 7b (Mo. St. Ann. Sec. 11071e-9, p. 7431) clearly contemplates the repayment of the election expenses to the county out of the proceeds of the sale of bonds, and that, since in the case at bar the election resulted in an authorization to issue the bonds, the question is a moot one. We will not so consider it. Situations may arise where the election was unfavorable to the issuance of bonds, in which event there could be no repayment.

"No authority is cited by respondent in support of his position. Relator cites the case of State ex rel. Lynn v. Board of Education, 141 Mo. 45, 41 S.W. 924, in support of this provision of the act. In that case the same objection was made to an act of the Legislature requiring the city of St. Louis to pay the expense of a school election held within the city. We sustained the validity of the statute. Again in the recent case of State ex rel. Russell et al. v. State Highway Commission, 328 Mo. 942, loc. cit. 963, 42 S.W. 2d 196, we held that a statute authorizing the state highway commission to build state highways through municipalities with state funds was not a gift or grant to such municipalities within the meaning of section 46 of article 4. We see no difference in principle between those cases and the situation before us. The payment of the election expense of the newly created sewer district was not a gift or grant to that district within the meaning of section 46 of article 4 of the Constitution."

The Supreme Court of Missouri has said in State ex rel. Preisler v. Woodward, 105 S.W. 2d 912, 340 Mo. 906, (S.W.) 1.c. 915:

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"* * *It is true, the legislative power, generally speaking, is unlimited, save as the Constitution has set bounds to it.
* * *"

The Supreme Court of Missouri in the case of State ex rel. Volker et al. v. Kirby, 136 S.W. 2d 319, 345 Mo. 801, considered the question of whether or not Jackson County had to pay warrants issued by the Kansas City Election Commissioners. The court said (S.W.) 1.c. 320:

"Respondent also contends that the election law in question violates Sec. 36, Art. VI of the constitution, Mo. St. Ann., which follows: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. * * *' In other words, he contends that the election board is conducting county business.

"The maintenance of an election board is a state function. Indeed, respondent does not contend that the maintenance of such a board is not a state function. If a state function, the legislature has the authority to compel the city and county to join in providing for said maintenance. State ex rel. Faxon v. Owsley, 122 Mo. 68, 26 S.W. 659; State ex rel. Lynn v. Board of Education, 141 Mo. 45, 41 S.W. 924; State ex rel. Hawes v. Mason, 153 Mo. 23, 54 S.W. 524; State ex rel. Wm. C. Reynolds et al. v. Hy. L. Jost et al., 265 Mo. 51, 175 S.W. 591, Ann. Cas. 1917D, 1102."

Judge Ellison in a concurring opinion in this same case said, (S.W.) 1.c. 323:

"* * *Respondent says they delegate unlimited power to the Board of Election Commissioners of Kansas City to appropriate money for their own use and to create subordinate officers, in violation of Article III and sec's 1 and 10 of Art. X of the state Constitution. This contention is grounded mainly on State ex rel. Field v. Smith, 329 Mo. 1019, 49 S.W. 2d 74.

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* * * * *

"The power is not despotic, with absolute immunity from judicial review; but the board's decision is prima facie valid and the county court has no independent power to overrule it. This is not only what the statute means, but is the wiser rule. The way would be thrown open for raids on the treasury if such unlimited power were placed in improper hands, but, on the contrary, the legislative purpose would be thwarted if the board were subject to local domination."

CONCLUSION

It is the opinion of this department that the Legislature has the power and authority to provide for the payment by both counties of warrants issued by a board of election commissioners of a city located in two counties.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INSURANCE:
FOREIGN INSURANCE CORPORATIONS:

Section 6007, R.S. Mo. 1939 prohibiting removal of cases from State Courts to Federal Courts by foreign insurance corporations is unconstitutional.

February 16, 1950



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Superintendent Leggett:

This will acknowledge receipt of your letter requesting an opinion of this department respecting the right of the Superintendent of Insurance to proceed, under Section 6007, R.S. Mo. 1939, to revoke the license of a foreign insurance company to carry on its business in this State under the provisions of Article 6, Chapter 37, R.S. Mo. 1939, because of the removal by such insurance company to the Federal Court of a cause filed in a State Court without the consent of the opposite party.

Your letter states:

"Under date of May 23, 1949, the Superintendent of Insurance received a request from Frank Lowry, Attorney At Law, representing a Mrs. Christina C. Mercer, to forthwith revoke the license issued to Millers Mutual Fire Insurance Company, a Corporation, organized under the laws of the State of Pennsylvania, and admitted to do business in the State of Missouri, under the provisions of Article 6, Chapter 37, R.S. Missouri, 1939.

"Mr. Lowry's client, Mrs. Christine C. Mercer, a resident of Missouri, filed a suit against Millers Mutual Fire Insurance Company in the Cape Girardeau Court of Common Pleas. Subsequently, the defendant removed the cause to the United States District Court at Cape Girardeau, Missouri, without the consent of

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the plaintiff. The request for the revocation of the license of Millers Mutual Fire Insurance Company is made under the terms and provisions of Section 6007, Revised Statutes of Missouri, 1939.

"Will you please advise this Department as to the constitutionality of Section 6007, R. S. Missouri, 1939, and further advise as to whether the Superintendent of Insurance should proceed to take action under the provisions of said Section 6007, R.S. Missouri, 1939, on a request such as the one received in this case."

You submit two questions for our attention:

First: Is said Section 6007 constitutional, and

Second: Should the Superintendent of Insurance proceed to take action under the terms of said Section 6007 to revoke the license of a foreign insurance company upon a request such as the one received in this case.

Section 6007, R.S. Mo. 1939, has not been before our Supreme Court or the Supreme Court of the United States for construction. The constitutionality of statutes having similar provisions as are in Section 6007, from the insurance codes of other States, however, have been determined by the Supreme Courts of those States and by the Supreme Court of the United States.

A Missouri statute, Act of March 13, 1907 (Laws of Missouri, 1907, pp. 174, 175) prohibiting foreign railroads from filing suits in, or from removing lawsuits to Federal Courts from State Courts, without the consent of the opposite party, was held invalid by the Supreme Court of the United States in *Herndon, Prosecuting Attorney, et al., vs. C.R.I. & P. Railway Company*, 218 U.S. 135. A like case involving the same statute was filed in the Supreme Court of Missouri directed against a Circuit Judge of this State and the then Secretary of State as respondents (*State ex rel. Missouri-Arkansas Railroad Company vs. Johnston, Judge, and Roach, Secretary of State, et al.*, 234 Mo. 338).

The precise question was involved in the Johnston case as was before the United States Supreme Court in the Herndon case. The Supreme Court of Missouri, during the period of its consideration of the Johnston case, took note of the decision by the United States Supreme Court in the Herndon case, (218 U.S. 135), and approved and commended its decision that the March 13, 1907 Act was invalid.

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Said Section 6007, R.S. Mo. 1939, reads as follows:

"If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large and general circulation in the state: Provided, however, that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority."

The same Legislature, Laws of Missouri, 1907, pages 174, 175, enacted three sections amending an existing statute to prohibit foreign railroad corporations from filing suits in, or without the

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consent of the opposite party, removing cases to the Federal Courts from State Courts. Section 1 of the Act is almost in the same identical language as is contained in said Section 6007.

The suit to test the Act of March 13, 1907--the statute affecting railroads--was brought by the Chicago, Rock Island and Pacific Railway Company, an Illinois corporation, in the Circuit Court of the United States for the Western District of Missouri against Herndon, Prosecuting Attorney of Clinton County, Missouri, and Swanger, Secretary of State of Missouri. The defendants filed demurrer to the bill. The Court overruled the demurrer and held the Act invalid. The appeal by the defendants to the United States Supreme Court follows:

The Supreme Court affirmed the decree of the Circuit Court enjoining the Missouri officers from enforcing said Act. The Court, in its decision, 1.c. 158, 159, said:

"As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the State of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, or remove one from the state courts to the Federal courts, but little need be said. This is so because of the cases decided at this term involving contentions kindred to the one made in this case. See Western Union Tel. Co. v. Kansas, 216 U.S. 1; Pullman Co. v. Kansas, 216 U.S. 56; Ludwig v. Western Union Tel. Co., 216 U.S. 146; Southern Railway Co. v. Green, 216 U.S. 400.

"Applying the principles announced in those cases, it is evident that the act in controversy cannot stand in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy a domestic railroad company might bring an action in the Federal court, or in a proper case remove one thereto,

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without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do local business within the State may not have been derived from the Federal Constitution, the right to report to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.

"It is enough now to say that within the principles decided at this term, in the cases cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void.* * *"

The Supreme Court of Missouri, aware of the decision by the Supreme Court of the United States l.c. 347 in the Johnston case, said:

"Since this proceeding has been pending in this court the main question in the case has been decided by the Supreme Court of the United States. In the case of Herndon v. Chicago, R.I. & P.R.R. Co., 218 U.S. 135, it was decided that the act of the General Assembly approved March 13, 1907, above mentioned, was in conflict with the Constitution of the United States, was void and of no effect. In that decision we entirely concur. * * *"

Statutes containing the same provisions as said Section 6007 were enacted in insurance codes of other States, particularly Wisconsin and Kentucky. Such statutes were upheld by the Supreme Court of each State, respectively. These cases were appealed to the Supreme Court of the United States. In each case the State statute was held by the Supreme Court to be not in conflict with the Federal Constitution. (Doyle vs. Continental Insurance Company, 94 U.S. 535, Security Mutual Life Insurance Company vs. Prewitt, Insurance Commissioner of the State of Kentucky, 102 U.S. 246). There were, however, dissenting opinions in each of the two cases. Not until the case of Terral, Secretary of State of Arkansas vs. Burke Construction Company, 257 U.S. 529, came before the Supreme Court was there any change in the Court's views.

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The Legislature of the State of Arkansas had enacted the Act of May 13, 1907, Section 1 of which reads as follows:

"If any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation."

A suit was filed to test the constitutionality of the Arkansas statute. The United States District Court of Arkansas held the statute unconstitutional and the case was appealed to the Supreme Court of the United States.

The opinion briefly and directly states the question at issue, discusses the principles involved in the construction of the Arkansas Act of May 13, 1907, cites and briefly discusses the Doyle and Prewitt cases and overrules both, on the ground that the statutes construed and upheld in those cases were invalid, as being in contravention of Section 2 of Article III and Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Court in the Arkansas case, in the decisive text of the opinion, l.c. 531, 532, 533, said:

"The sole question presented on the record is whether a state law is unconstitutional which revokes a license to a foreign corporation to do business within the State because, while doing only a domestic business in the State, it resorts to the federal court sitting in the State.

"The cases in this court in which the conflict between the power of a State to exclude a foreign corporation from doing business within its borders, and the federal constitutional right of such foreign corporation to resort to the

Mr. C. Lawrence Leggett

federal courts has been considered, cannot be reconciled. They began with Insurance Co. v. Morse, 20 Wall. 445, which was followed by Doyle v. Continental Insurance Co., 94 U.S. 535; Barron v. Burnside, 121 U.S. 186; Southern Pacific Co. v. Denton, 146 U.S. 202; Martin v. Baltimore & Ohio R.R. Co., 151 U.S. 673, 684; Barrow S.S. Co. v. Kane, 170 U.S. 100, 111; Security Mutual Life Insurance Co. v. Prewitt, 202 U.S. 246; Herndon v. Chicago, Rock Island & Pacific Ry. Co., 218 U.S. 135; Harrison v. St. Louis & San Francisco R.R. Co., 232 U.S. 318, and Wisconsin v. Philadelphia & Reading Coal & Iron Co., 241 U.S. 329.

"The principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of Doyle v. Continental Insurance Co., 94 U.S. 535, and Security Mutual Life Insurance Co. v. Prewitt, 202 U.S. 246, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court. The appellant in proposing to comply with the statute in question and revoke the license was about

Mr. C. Lawrence Leggett

to violate the constitutional right of the appellee. In enjoining him the District Court was right, and its decree is

Affirmed."

We believe the above cited and quoted decision of the Supreme Court of Missouri and the Supreme Court of the United States holding statutes similar to said Section 6007 invalid will determine both questions submitted to us. Upon these cases this department bases its belief that because such other statutes, having like provisions to those of said Section 6007, have been held unconstitutional, then Section 6007 is also unconstitutional and void, and that because of the invalidity of said Section 6007 the Superintendent of the Division of Insurance should not proceed under said Section, in the instant case, to revoke the license of the named foreign insurance corporation.

CONCLUSION

It is, therefore, the opinion of this department:

1) That said Section 6007, R.S. Mo. 1939, because it denies to a foreign insurance corporation the privileges guaranteed to it of invoking the judicial power of the United States and denies to it equal protection of the law under Section 2, Article III and Section 1 of the Fourteenth Amendment, respectively, of the Constitution of the United States, is unconstitutional.

2) That because said Section 6007, R.S. Mo. 1939, is, by reason of the named decisions of the Supreme Court of Missouri and the Supreme Court of the United States, to be deemed invalid and of no effect, the Superintendent of the Division of Insurance should not proceed to take action under the provisions of said Section 6007 to revoke the license of the foreign insurance corporation named to do business in this State.

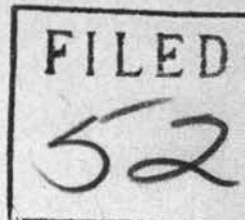
Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

#192
4/17/50
April 15, 1950



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Jefferson City, Missouri

Attention: Mr. Thomas J. Guilfoil, Counsel

In Re: Amendment of Articles of Incorporation of
Physicians Life and Casualty Company of
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date by which you submitted to this office certified copies of the proceedings of the stockholders and directors meetings of the Physicians Life and Casualty Company of St. Louis, Missouri, held on March 14, 1950, for the purpose of amending the Articles of Incorporation to enable the company which is now organized and existing under the provisions of Article 4, Chapter 37, R. S. Missouri, 1939, to avail itself of the privilege extended by Section 5887, R. S. Missouri, 1939, of accepting the provisions of Article 2, Chapter 37, R. S. Missouri, 1939, and also for the purpose of authorizing increase in the capital stock of said company by declaration of a stock dividend out of surplus.

We have examined the certified copies of the proceedings above referred to and find that they are sufficient in form and do not contravene the Laws of the State of Missouri, nor are they inconsistent with the Constitution of Missouri or the Constitution of the United States.

Respectfully submitted,

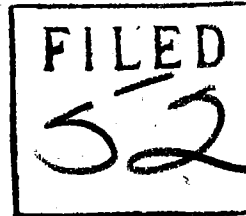
JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M/feh

225
May 5, 1950



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson City, Missouri

Attention: Mr. Thomas J. Guilfoil, Chief Counsel

In Re: Declaration of Incorporators of Farm
Bureau Life Insurance Company of Mo.

Dear Sir:

This will acknowledge receipt of your letter of recent date by which you submitted to this office the Declaration of Incorporators of the Farm Bureau Life Insurance Company of Missouri, a stock life insurance company to be formed under the provisions of Article 2, Chapter 37, R. S. Missouri, 1939, together with proof of publication of such Declaration of Incorporators as is provided by law.

The documents have been examined, and it is the opinion of this department that they comply with the Laws of the State of Missouri, and that they are not inconsistent with the constitution and laws of this state and the United States but are in accordance with the provisions of Article 2, Chapter 37, R. S. Missouri, 1939.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JLO'M/feh
Enclosure

INSURANCE) Section 6012, R. S. Missouri, 1939, comprehends gross
TAXATION) premiums obtained and is not limited to net premiums
obtained.

August 8, 1950

8/11/50

Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri



Dear Mr. Leggett:

The following opinion is rendered in reply to your request of recent date reading as follows:

"Pursuant to a request made from your office, our requests for an opinion dated March 17, 1950 and June 30, 1950 with reference to Section 6012, R. S. Missouri, 1939 are herewith withdrawn.

"Under the provisions of Section 6011, R. S. Missouri, 1939, individuals may be licensed to place Missouri insurance business in companies not admitted to do business in this state under certain very limited circumstances. When business is placed in a non-admitted company by an individual possessing a license under Section 6011, a tax of 5% is due to the State of Missouri on the premiums arising out of this business. The tax is levied under the provisions of Section 6012, R. S. Missouri, 1939.

"This Division has been permitting excess agents licensed under the provisions of Section 6011 to make certain deductions in filing the tax return required under Section 6012, R. S. Missouri, 1939, among those deductions being a deduction for the cancellation of policies of insurance placed in a non-admitted company. In other words, the agent is permitted to deduct from the total amount of premiums obtained the amount of premiums returned

Honorable C. Lawrence Leggett

upon cancellation in order to determine his net premiums and the net premiums obtained by him have been used as a tax basis. Another example is the situation where the premium is subject to an adjustment and upon adjustment, a certain portion of the initial premium deposit is returnable.

"In Metropolitan Life Insurance Company v. Scheufler cited by the Supreme Court of Missouri in 1944, and reported in 180 S.W. (2d) 742, the Court stated that 'The return of any part of a premium received will not, of itself, operate as a prorata reduction of the tax payable.' 1. c. 744. There was, of course, a different tax statute involved in the Metropolitan Life case, but the language of the court has created a doubt as to the propriety of permitting any deductions whatsoever in computing the tax liability of excess agents.

"Accordingly, your opinion is respectfully requested as to whether the tax provided in Section 6012, Article 10, Chapter 37, R. S. Missouri, 1939, is a gross premium tax or whether the tax should be levied on the net premiums received by the excess agent. In that connection, your attention is respectfully directed to Section 6014 and Article 12, R. S. Missouri, 1939, wherein provisions are made for other types of premium taxes."

Section 6011, R. S. Missouri, 1939, provides:

"The superintendent of insurance, however, may issue to an agent who is regularly commissioned to represent one or more insurance companies, authorized to do business in this state, a certificate of authority to place excess lines of insurance in companies not admitted to do business in this state: Provided, however, that the party desiring such excess of insurance shall first file an affidavit with the superintendent of insurance that he has exhausted all the insurance obtainable from authorized companies."

Honorable C. Lawrence Leggett

Section 6012, R. S. Missouri, 1939, provides:

"Every agent so licensed shall report, under oath, to the superintendent of insurance on the first days of June and December of each year the amounts of premiums obtained by him for such excess insurance, and shall pay the said superintendent a tax of five per cent thereon; and he shall also file an approved bond with the said commissioner in the sum of one thousand dollars for the faithful observance of the above provisions and a prompt discharge of his duties therein."

The tax provided for in Section 6012, quoted above, is to be paid by an insurance agent in this state who places excess insurance with companies, not licensed to do business in Missouri, pursuant to authority contained in Section 6011, quoted above.

It is admitted that the Division of Insurance has been permitting these insurance agents, denominated excess agents, to deduct from their returns filed under Section 6012, supra, premiums returned to the policyholder on account of cancellations, or adjustments made with the policyholder which require a portion of the initial premium deposit to be returned to the policyholder.

Sections 6011 and 6012, supra, make no reference whatever to gross or net premiums. Section 6012 refers only to "premiums obtained" by the agent for such excess insurance. Upon the amount of "premiums obtained" by the agent the Legislature of Missouri has plainly imposed the tax. In Metropolitan Life Insurance Company v. Scheufler (Mo.), 180 S.W.(2d) 742, the Supreme Court of Missouri was construing the term "premiums received" as the same is used in Section 6904, R. S. Missouri, 1939, a statute taxing premiums received by foreign insurance doing business in Missouri. In the course of its opinion the court spoke as follows at 180 S.W.(2d) 742, 1. c. 744:

"The term is not construed by this court to mean that only those portions of the premiums received which are retained for (or used in) the company's business are taxable. The term is, by this court, construed according to plain meaning of the language as in the statute written, that is, premiums received, whether in cash or in notes, in this state or on account of business done in this state. * * * The return

Honorable C. Lawrence Leggett

of any part of a premium received will not, of itself, operate as a pro tanto reduction of the tax payable."

In the Metropolitan Life Insurance case, cited above, the court had before it Section 6094, R. S. Missouri, 1939, a taxing statute which exempted from taxation certain types of premium refunds specified in the section. Section 6012, R. S. Missouri, 1939, which we are called upon to construe makes no reference to any type of premium refunds as being deducted for taxing purposes. The words of the statute should be given this plain and ordinary meaning in the absence of ambiguity.

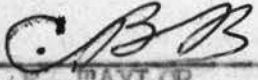
CONCLUSION

It is the opinion of this department that the term "premiums obtained" as found in Section 6012, R. S. Missouri, 1939, has reference only to gross premiums obtained and is not to be limited to "net" premiums obtained.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General



J. E. TAYLOR
Attorney General

JLO'M/feh

INSURANCE) Approval of increase of capital stock of the
) American Automobile Fire Insurance Company.

October 6, 1950

10/6/50



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Attention: Honorable James H. Meredith

Dear Sir:

Your letter of October 4th, requesting an opinion on the legality of the proceedings of the American Automobile Fire Insurance Company, St. Louis, Missouri, Stockholders and Board of Directors in their proceedings to increase the capital stock of that company has been received by this department.

Your letter reads as follows:

"Enclosed herewith are four copies of a Certificate of Amendment of the Articles of Incorporation of the American Automobile Fire Insurance Company, increasing its Capital Stock from \$600,000 to \$1,200,000.

"These are submitted to you for your approval or disapproval."

This department has made investigation of the laws of the State of Missouri, the Constitution of the State of Missouri and the Constitution of the United States insofar as they relate to the subject matter under consideration.

From an examination made of the certified copies of the minutes of the meetings of both the stockholders and the Board of Directors of this company they appear to be regular and to have substantially and fairly complied with

Honorable C. Lawrence Leggett

the provisions of the laws of the State of Missouri, the Constitution of Missouri, and the Constitution of the United States, and especially these proceedings appear to have complied with Sections 6026 and 6027, Article X, Chapter 37, R. S. Mo. 1939. There is nothing found in said proceedings to be inconsistent with the Constitution of this State, or the Constitution of the United States.

CONCLUSION

It is, therefore, the opinion of this department that the proceedings of the American Automobile Fire Insurance Company at the stockholders' and directors' meetings proposing to increase the capital stock of said company from \$600,000 to \$1,200,000, as certified to, as required by law, and as submitted to the Department of Insurance of the State of Missouri, were and are regular and are consistent with the provisions of the laws of the State of Missouri, the Constitution of the State of Missouri and the Constitution of the United States.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JLO'M/feh

INSURANCE: Union Automobile Club membership contract providing reasonable, minimum and maximum indemnities in money for risks incurred in a contract of insurance and may not be issued without compliance with the Insurance Code of Missouri.

October 10, 1950



Honorable C. Lawrence Leggett
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in compliance with your request of September 20, 1950, reading as follows:

"Enclosed herewith is a specimen copy of the contract written by the Union Automobile Club of Kansas City, Missouri. Also enclosed are changes suggested by their attorney in Articles 14, 15, and 16.

"This company has been operating in the State of Missouri, and the question has been raised by a number of persons as to whether or not the contract as written constitutes doing insurance business. The attorney for this company was called in and has made the suggested changes enclosed herewith.

"Will you please advise this department whether or not the contract, as written, with the suggested changes, constitutes an insurance contract and comes under the regulation of the insurance department which would require them to organize a corporation under some of the insurance laws of the State of Missouri."

In this instance we must construe the form of membership contract, forwarded with the letter requesting an opinion from this office, which is being issued by Union Automobile Club of Missouri. It stands admitted that Union Automobile Club is not at this time licensed by the Division of Insurance to conduct an insurance business in Missouri. If provisions of the membership contract being

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construed cause the same to fit the definition of an insurance contract as defined by our appellate courts, then the Union Automobile Club or those acting for or in its behalf in effecting the membership contract are amendable to the general regulatory and penal provisions of Missouri's Insurance Code found in Chapter 37, R. S. Missouri, 1939.

Section 6020 of Article 10, Chapter 37, R. S. Missouri, 1939, provides, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance department of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, which penalty may be recovered by ordinary civil action in the name of the state, * * *"

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1. c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1. c. 278, the Kansas City Court of Appeals used the following language in discussing the words, "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury
* * * Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay him a sum of money, or otherwise indemnify him.'"

We now turn to the membership contract and discuss its various provisions. The face of the contract discloses that the services or benefits described therein are provided by Union Automobile Club to the holder of such contract only after a membership fee in money is paid by the holder, and that such membership is

Honorable C. Lawrence Leggett

for a term of years; that the services or benefits provided by the contract are available to the member holding such contract and his immediate family, on a motor vehicle to be described in the contract, and that the contract "is a non-assessable automobile club membership." In the contract, services and benefits are fully described in twenty-five general provisions. At the very outset we find that general provisions numbered 4, 5, 6, 13, 18, 19, 20, 21, 22, 23, 24 and 25 provide for certain services to be rendered by the Union Automobile Club to its contract holders without such persons being obligated over and above the membership fee charged. This cannot be said of general provisions numbered 1, 2, 3, 7, 8, 9, 10, 11, 12, 14, 15, 16, and 17 of the contract, and since the ultimate conclusion to be reached in this opinion will result in denominating benefits under these numbered provisions to be insurance risks, such benefits are now described, as they are titled in the contract, as follows:

1. Day and night road service;
2. 24-hour towing service;
3. Tire changing;
7. \$5,000 bail bond;
8. Legal expense for defense of criminal charges;
9. Legal expense for defense of traffic violations;
10. Legal expense for defense of property damage claims;
11. Legal expense for collecting collision damages;
12. Legal advice and counsel;
14. Accident medical care;
15. Ambulance service;
16. Hospital benefits;
17. Cash for accident travel expense.

In the numbered and titled provisions, as above set forth, except general provisions numbers 7 and 17, the Union Automobile Club contracts to reimburse the contract holder in "reasonable," and "maximum" amounts of money actually expended by the contract holder for expenses resulting directly from the risks incurred. General provision numbered 7 provides a bail bond in the amount of \$5,000 and general provision 17 provides not to exceed \$50 in cash for travel expenses from the scene of an accident. It is not feasible or necessary to discuss each of the general provisions of the contract which provide indemnity in order to rule on the contract as a whole. However, general provisions numbered 14, 15, and 16 of the contract are hereinafter set forth, in order to acquaint readers of this opinion with the scope of indemnity offered by the contract.

"XIV. The Club will reimburse the member upon presentment of a receipted bill for an amount not to exceed Ten (\$10.00) Dollars for professional services rendered to the member or any

Honorable C. Lawrence Leggett

of member's immediate family at the scene of a collision involving the motor vehicle described herein or within twenty-four (24) hours hereafter by a duly licensed medical doctor when such services are for bodily injuries sustained as a direct result of collision occurring while said member or any of member's immediate family is engaged in the operation of the motor vehicle herein described.

"XV. The Club will reimburse the member upon presentment of a receipted bill for an amount not to exceed Five (\$5.00) Dollars for conveying the member or any of member's immediate family from the scene of a collision involving the herein described motor vehicle to the nearest place at which the member or any of member's immediate family can receive medical treatment, when such medical treatment is urgently required due to bodily injuries received as a direct result of such collision.

"XVI. The Club will reimburse the member upon presentment of a receipted bill for hospital expenses incurred by the member or any of member's immediate family, when said member or any of member's immediate family sustains bodily injuries as a direct result of a collision occurring while said member or any of member's immediate family is engaged in the operation of the vehicle herein described, and when said member or any of member's immediate family is committed for treatment to a recognized hospital by a duly licensed medical doctor. The Club will, upon request, pay member's hospital bill as hereinbefore set forth, directly to the hospital upon presentment of a verified statement from said hospital. The limit of the Club's obligation under this Section shall not exceed Five (\$5.00) Dollars for each day the member or any of member's immediate family is hospitalized for injuries as a direct result of said collision; nor shall the Club's obligation extend for more than a period of thirty (30) days following the date of said collision; nor shall the Association be liable or obligated for more than One Hundred Fifty (\$150.00) dollars hereunder during the term of this contract."

Honorable C. Lawrence Leggett

Along with the opinion request there has been submitted suggested changes in general provisions numbered 14, 15 and 16 of the contract. Even with suggested changes, general provisions numbered 14 and 15 still promise a maximum amount in money for medical care and ambulance service. The only appreciable change to be noted in the suggested changes is that they would do away with the necessity of the contract holder presenting receipted bills before the contract liability is discharged. Suggested changes in general provision numbered 16 still contain the provision that the club will provide the hospital benefits described therein upon presentation of a receipted bill for such expenses. In attempting to rewrite general provisions numbered 14, 15 and 16 of the contract an effort has been made to disguise the indemnity offered as merely a service to the contract holder.

National Auto Service Corporation v. State, 55 S.W. (2d) 209, was a suit by quo warranto by the State of Texas at the instance of the Insurance Commission of Texas to forfeit the charter of National Auto Service Corporation on the ground that the corporation was writing insurance without complying with the insurance laws of Texas. In that case the National Auto Service Corporation issued to its members a membership certificate, which provided, among other things, that for annual dues of \$25.00 it would cause to be repaired in its membership garages during that year any damage to the member's automobile caused by accident not less than \$7.50, not more than \$250.00. A certificate for a maximum repair charge not to exceed \$500.00 was also issued for an annual charge of \$45.00. The certificate also contained certain provisions limiting liability of the company, as to notice, expulsion, and nonassessment of members, etc., and the following clause:

"* * * It must be clearly understood that this is not insurance, as the corporation never pays its members any money, as indemnity except to repair any damage to member's automobile at the corporation's authorized repair shops as hereinabove provided." * * *

In sustaining a forfeiture of the corporation's charter the Court of Civil Appeals of Texas spoke as follows:

"What constitutes insurance has been defined by statute in many states, and has been frequently defined by the courts. Its essential elements as relate to property are that it provides, for a consideration, indemnity against loss or damage to property, in which the assured has an interest which may result from some uncertain or unforeseen contingency.

Honorable C. Lawrence Leggett

Cooley's Briefs on Insurance (2d Ed.) Volume I, page 6, defines an insurance contract as 'an agreement by which one party for a consideration promises to pay money or its equivalent or do some act of value to the assured upon the destruction or injury of something in which the other party has an interest.;

"Couch's Cyc. of Insurance Law, Vol. 1, p. 2, defines such contract as 'an undertaking by one party to protect the other party from loss arising from named risks, for the consideration and upon the terms and under the conditions recited.' * * * Whether or not a contract is one of insurance is to be determined by its purpose, effect, contents, and import, and not necessarily by the terminology used, and even though it contain declarations to the contrary. * * * Nor is it essential that loss, damage or expense indemnified against necessarily be paid to the contractee. It may constitute insurance if it be for his benefit and a contract on which he, in case of a breach thereof, may assert the cause of action. * * * In the instant case we think it clearly appears that the purpose of the contract made by appellant was, for a fixed consideration, to indemnify the holder of the certificate against loss resulting from accidental damage to his car within the limits fixed by the certificate, and that it constituted an insurance contract under the rules above announced."

We consider the contract being construed as well within the rules announced in National Auto Service Corporation v. State, cited above. The contract contains eleven special provisions relating to reinstatement, cancellations, suspended status, period of grace, exclusions, legal expense, definitions of terms, bail bond, acceptance by member and action against the association. For the purpose of this opinion it will not be necessary to discuss any of the special provisions, since the conclusion hereinafter stated rests on our interpretation of general provisions contained in the contract.

CONCLUSION

It is the opinion of this department that the membership contract issued by the Union Automobile Club, and particularly described

Honorable C. Lawrence Leggett

in this opinion, is a contract of insurance, and the issuance of the same constitutes the doing of insurance business; that the issuance of such a contract without being qualified to do so under applicable provisions of Chapter 37, R. S. Missouri, 1939, constitutes a violation of the Insurance Code of Missouri.

Respectfully submitted,

JULIAN O. O'MALLEY
Assistant Attorney General

APPROVED:

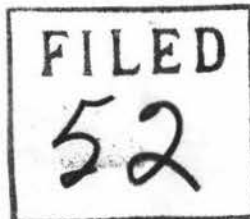
J. E. TAYLOR
Attorney General

INSURANCE-Increase of capital stock:

Proceedings of Business Men's Assurance Company of America increasing its capital stock and authorizing the directors to declare dividend of capital stock comply with the laws of this State and are constitutional.

December 11, 1950

Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson City, Missouri



Attention: Honorable Bernard L. Cohen,
Assistant Counsel.

Dear Superintendent Leggett:

This will acknowledge your letter requesting the opinion of this department respecting the legality of the proceedings of the Business Men's Assurance Company of America in amending its Articles of Incorporation to increase its capital stock.

You have transmitted with your letter authenticated documents which indicate the proceedings of record by said company to effect such increase of capital stock as follow:

1) Copy of the records of said company of its regular meeting of the Board of Directors, November 10, 1950, passing a resolution to such effect and submitting to the stockholders of said company the proposition to amend Article IV of the Articles of Incorporation of said company by increasing the capital stock of said company from \$2,000,000.00 divided into 20,000 shares of the par value of \$100.00 each to \$4,000,000.00 divided into 40,000 shares of the par value of \$100.00 each and calling a special meeting of such stockholders at the company's office, 215 Pershing Road, Kansas City, Missouri, on November 29, 1950, at 3:00 O'Clock P.M. for the purpose of considering such proposition, certified by the secretary of said company with the seal of said company attached;

Honorable C. Lawrence Leggett:

2) A certified copy of the proceedings of the stockholders of said company at the special meeting of such stockholders called and held on November 29, 1950, at the time and place as provided by said resolution, amending the Articles of Incorporation of said company by increasing the capital stock of said company from \$2,000,000.00 to \$4,000,000.00, such increase thereof divided into 40,000 shares of the par value of \$100.00 each, all of which is fully paid up, and directing and authorizing the directors of such company to declare a stock dividend of \$2,000,000.00 or 100% on the outstanding capital stock of the company payable at such time as said increase in the capital stock is authorized and approved, and to issue to the stockholders in payment thereof certificates for shares of fully paid, non-assessable stock of the company in the amounts to which such stockholders shall be respectively entitled, according to the stock records of the company as of the date on which such dividend shall be declared, such shares to be paid for by the transfer to capital from the unassigned surplus of the company of an amount equal to the par value of the shares so issued, certified by the secretary of said company, with the seal of said company attached;

3) The statement of the secretary of Business Men's Assurance Company of America signed and sworn to before a notary public in and for Jackson County, Missouri, with notarial seal attached, made and signed November 29, 1950, in Jackson County, Missouri, that he caused notice in writing on November 16, 1950, of a special meeting of the stockholders of the company to be held on November 29, 1950, in the form hereto attached and made a part of said sworn statement, to be given to the stockholders of the company by depositing a copy of such notice in the United States Post Office at Kansas City, Missouri, in a sealed envelope, postage prepaid, duly addressed to each stockholder of the company at his last known post office address as the same appeared on the books of the company;

4) A copy of the form of notice of said special meeting of the stockholders of said company November 29, 1950, so mailed to such stockholders on November 16, 1950, and made a part of such sworn statement so made by the

Honorable C. Lawrence Leggett:

secretary of said company certifying that such notices of said special meeting were so given and,

5) Photostatic copy of proof of publication of notice of shareholders' meeting of Business Men's Assurance Company of America to be held at the home office of the company on November 29, 1950, for the purpose of considering a proposal to amend the Articles of Incorporation of the company to increase its capital stock from \$2,000,000.00 to \$4,000,000.00 and a proposal to authorize the declaration of a 100% stock dividend payable out of such stock increase, as appears by the affidavit of Clifford B. Smith, one of the publishers of the Daily Record, a newspaper of general circulation, published daily except Sundays, in Kansas City, Jackson County, Missouri, and whereby it further appears that said notice of such shareholders' meeting was duly published in the daily edition of said newspaper nine (9) days beginning November 16, 1950, and in each of the following issues thereafter, to and including November 25, 1950, being Nos. 119 to 127, both inclusive, of Volume 126 of said newspaper, said affidavit and proof of such publication being subscribed and sworn to in Jackson County, Missouri, on the 25th day of November, 1950, by said Clifford B. Smith, before Thomas F. Brasnehen, a notary public in and for Kansas City, Jackson County, Missouri, with notarial seal attached.

We have examined these documents, certifications and evidences of the action of the Board of Directors and the action of the stockholders of said company in their respective proceedings of record to increase the capital stock of said company from \$2,000,000.00 to \$4,000,000.00 divided into 40,000 shares of the par value of \$100.00 each, and providing that the directors of said company be authorized and directed to declare a stock dividend of \$2,000,000.00 or 100% on the outstanding capital stock of the company, payable at such time as such increase in the capital stock as authorized and approved, and it is the opinion of this department that all of the proceedings of said company, made in the premises, to increase its capital stock as aforesaid, and to make such dividend of such stock as aforesaid, are all in compliance with the laws of the State of Missouri, and that they are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

APPROVED:

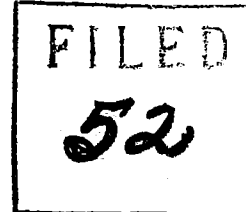
GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

GWC:lr

INSURANCE: Approval to increase capital stock of National Fidelity Life Insurance Company.

December 27, 1950



Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson City, Missouri

Attention: Mr. James H. Meredith, Counsel

Dear Sir:

This will acknowledge receipt of your request of December 22, 1950, for an official opinion, which reads:

"Enclosed herewith is a copy of the minutes of meetings of the Directors and Stockholders of the National Fidelity Life Insurance Company for an increase of capital stock from \$200,000.00 to \$500,000.00.

"These proceedings are for your approval or rejection."

We have examined the enclosed record of the proceedings of a special meeting of the Board of Directors and Stockholders of the National Fidelity Life Insurance Company increasing the capital stock of said company from \$200,000.00 to \$500,000.00 and declaring a stock dividend.

It is the opinion of this department under the enclosed record that such proceedings are in proper form and substance.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

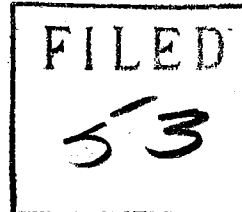
J. E. TAYLOR
Attorney General

ARH:VLM

ASSESSORS: County assessor in a fourth class county having a population of 7500 or more should receive forty-five cents for making one assessment list which contains an assessment of the real and personal property all under the same ownership; entitled to forty-five cents for making each non-resident real estate assessment list.

January 4, 1950

Mr. J. Bernie Lewis
Prosecuting Attorney
Douglas County
Ava, Missouri



1/6/50

Dear Sir:

Your request for an official opinion has been assigned to me. You state your request in the following manner:

"I would appreciate an opinion as to your interpretation of a portion of Section 1, page 1553, Missouri Laws 1945, pertaining to compensation of county assessors in fourth-class counties.

"The specific question being as follows, to-wit;

"Does the county assessor in a fourth-class county, having a population of over 7,500 receive 45 cents for each personal assessment list and resident land list and each nonresident real estate assessment list?"

This inquiry presents two questions, the first of which is: Where the assessor, in counties of the fourth class having a population of 7500 or more, makes the assessment of John Doe, who lives in the county and who owns both real and personal property, does the assessor make a list of the personal property, for which he is entitled to compensation, and another and separate list of real property, for which he is entitled to additional compensation, or, is the personal and real property all included in one list for which the assessor is entitled to the compensation provided by law for making one list?

In relation to this question we call your attention to Section 1, Laws of Missouri, 1945, page 1553. That section reads:

"The compensation of the county assessor in counties of the fourth class having a population of 7500 or more shall be 45

Mr. J. Bernie Lewis

cents per list, and in counties having a population of less than 7500 shall be .45 cents for each personal assessment list and resident land list and 20 cents for each non-resident real estate assessment list, and in all the counties of the fourth class, each county assessor shall be allowed a fee of 6 cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. The assessor in counties of the fourth class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

Inasmuch as in the instant case we are dealing only with a fourth class county which has a population of 7500 or more, the only part of Section 1 with which we are concerned, except the latter part regarding remuneration for entries, is that part which reads:

"The compensation of the county assessor in counties of the fourth class having a population of 7500 or more shall be forty-five cents per list."

Our question therefore is, as we stated somewhat more fully above, whether the assessor, in making the assessment of John Doe, who owns both personal property and real estate, and who lives in the county, makes one list for the personal property, and another and separate one for the real estate?

In considering this matter we wish to call your attention to section 10, Laws of 1945, page 1785, which gives to the State Tax Commission the authority to design the assessment forms to be used by county assessors. The pertinent part of this section states:

"The State Tax Commission shall design the necessary assessment blanks * * *"

We would next call your attention to the assessment forms which the State Tax Commission, acting under the authority of

Mr. J. Bernie Lewis

section 10, quoted above, designed for the use of the county assessors. This form is headed: 1947 Assessment List. The form then reads: List of taxable real and tangible personal property belonging to or under the control of _____ township, county and such.

Below this is listed: "First," with a place for the description of real estate. Below this is listed "Second," with spaces for the listing of tangible personal property. The important point in the above is that all of this property, both real and personal, is contained in one list, for which one list, under section 1, the assessor is entitled to receive forty-five cents.

This conclusion, that the assessment list shall contain both real and personal property, is sustained by an opinion rendered by this office on January 26, 1938. We quote from that opinion:

"In State v. Gomer, 101 S.W.(2d), 1.c. 66, the court drew nine conclusions concerning the duties and compensation of assessors. These conclusions concisely set out the compensation to be paid and we shall set them forth here with the exception of the third which has been completely nullified by this amendment. Also, we shall interpolate into them the changes this amendment has brought about and will omit matters required to be omitted by the new law. The interpolations will be indicated by parenthesis and underlined.

"First. That an assessor should obtain a list in the form prescribed by section 9756, R.S. 1929 (Mo. St. Ann. para. 9756, p. 7872), (as amended Laws of 1937, page 570), from every person who owns 'taxable personal property' (and real estate) in his county, (and its value)

"Second. That whenever from any cause a list of any taxable personal property (and real estate) is not delivered to him by the owner or his representative, then the assessor shall make a list thereof as required by section 9760, R.S. 1929 (Mo. St. Ann. para. 9760, p. 7877), or if the owner of such property is deceased

Mr. J. Bernie Lewis

then as required by section 9763,
R. S. 1929 (Mo. St. Ann. para. 9763,
p. 7879)."

This we believe to be a general law applicable to all counties.

It is the opinion of this department therefore, in view of the above, that when the assessor makes his assessment list he shall include in one list both personal and real property belonging to the same individual, for which one list he is entitled, under section 1, quoted above, to receive in counties of the fourth class with a population of 7500 or more, the sum of forty-five cents.

Your second question is: Whether the assessor in fourth class counties, having a population of 7500 or more, receives the sum of forty-five cents for making a nonresident real estate assessment list.

Section 1, quoted above, says that in counties of the fourth class with a population of 7500 or more, the assessor shall receive forty-five cents per list. We again call your attention to that part of the opinion rendered by this office on January 26, 1938, quoted above which states:

"First. That an assessor should obtain
a list * * * from every person who owns
'taxable personal property' (and real estate)
in his county. * * *"

This, as we said above, we believe to be a general law applicable to all counties, and that it imposes upon the assessor the duty of making a nonresident real estate list, for which, under Section 1, he is entitled to receive the sum of forty-five cents. (In order that you may have the benefit of a thorough discussion on this subject we are enclosing a copy of the January 26, 1938 opinion.)

CONCLUSION

It is the conclusion of this department that a county assessor in a fourth class county having a population of 7500 or more should receive forty-five cents for making an assessment list containing both real and personal property; that both real and personal property belonging to the same individual are contained in one list; that such an assessor is required to make a nonresident

Mr. J. Bernie Lewis

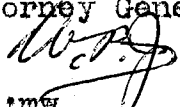
real estate list for which list he should receive forty-five cents.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General


HPW:mw
Enc.

COUNTY COURT:
ROADS:

County Court in Douglas County, a county of the Fourth Class not authorized to pay to the City of Ava any part of the road tax collected within said city for maintaining roads leading into city.

September 15, 1950.



Hon. J. Bernie Lewis,
Prosecuting Attorney
Douglas County,
Ava, Missouri.

Dear Sir:

This office is in receipt of your request for an opinion from this department on the following question:

"The County Court of this County has contracted with the City of Ava to turn to the city one-half of all road taxes collected from within the city for the purpose of the city's using such revenue to maintain roads leading into the city. I question the legality of the county court's power to turn such revenue over to the city, particularly inasmuch as Douglas County had adopted the county-wide road organization plan.

"I believe the issue might well be framed as follows, to-wit:

"In a county where all special and common road districts have emerged into a county wide road organization, does the county court have authority to pay a city one-half or any part of the road tax collected within said city for the purpose of maintaining roads leading immediately into said city?"

In your request for an opinion you indicate that the city of Ava is not located within a special road district and you do not indicate that the funds sought to be given to the city of Ava by the county court arise from a special benefit levy. The opinion will be prepared with these two facts in mind. We also take note of the fact that Douglas County is classified as a fourth class county.

It is the opinion of this office that no authority is conferred upon a county court of a fourth class county to pay to a city therein a part of the road tax collected within such city for the purpose of maintaining roads leading into the said city. This does not mean that the county court could not spend the road funds for the purpose of maintaining roads leading into such city but they could not give the money to the city to administer such expenditures.

Laws of Mo. 1945, p. 1478, Sec. 1 (R. S. Mo. A. Sec. 8527) reads as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district, and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village." (Emphasis ours.)

Your attention is directed particularly to that part of the section quoted which is underscored. While it provides that the part of the special road and bridge tax arising from and paid upon property not situated in a special road district may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county if said

street shall form a part of a continuous highway of said county leading through such city or village, there is no authorization for the county court to turn over such funds to a city for administration, use and expenditure.

We have carefully considered Article X, Section 12 of the Missouri Constitution which authorizes an additional tax for county Roads and Bridges in the following words:

Sec. 12(a):

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

Sec. 12(b):

"Nothing in this section shall prevent the refund of taxes collected hereunder to cities and towns for road and bridge purposes."

While section 12b cited above might appear to authorize a refund of taxes collected as described in section 12a this section is not a self-enforcing provision of the constitution and the county court would have no power to make such a refund unless authorized by further act of the state legislature. An example of such authorization may be found in L. 1945, p. 1263, Sec. 1 (R. S. Mo. A. 8531 A.1):

"In Class 1 counties the special road and bridge tax authorized by Section 12, Article X, of the Constitution of Missouri and arising from and paid upon all property, including real estate lying and being wholly within the corporate limits of each incorporated City, Town and Village, and upon tangible personal property of the residents of each incorporated City, Town and Village, shall be paid into the County Treasury and 50 percentum of such tax so collected may be placed to the credit of the incorporated City, Town or Village in which it was collected, and that the same may be paid out to such incorporated City, Town or Village, by the unanimous action of the County Court when the verified claim is made. Such claim may be paid upon warrants of the County Court in favor of the Treasurer or other designated Officer of such incorporated City, Town or Village, to be used and applied exclusively in the improvement and repair of established public roads, streets, and bridges within the corporate limits of such incorporated City, Town or Village; and the county highway engineer shall keep a separate voucher account for each of such incorporated Cities, Towns, and Villages. If any money remains in the County Treasury for two years from the date it was paid into the Treasury without being paid out, or appropriated for current incomplete contracts, such money shall be transferred from the City, Town or Village road fund in the Special Road and Bridge Fund and such City, Town, or Village, shall lose the benefit thereof. The remaining sum of all such tax funds whether collected upon property within a special road district or within the limits of any incorporated City, Town or Village, shall be retained and used by the County Court in the improvement of roads and bridges. Provided that refunds authorized under the provisions of this act shall not be made to any City having a population of more than 350 thousand inhabitants."

You will note that this authorization to the county court to pay out of the county treasury to the incorporated city, town, or Village applies only to Class 1 counties. We find no such authorization for such expenditure has been made to a county court in a county of the Fourth class.

It is a well established principle of government that a county court has only such authority as is conferred upon it by the legislature and the constitution (46 C.J. Sec. 287), and we

9-15-50

find no such authorization to a county court in a fourth class county.

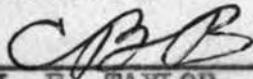
CONCLUSION.

It is the opinion of this office that the county court in Douglas County, a county of the fourth class, is not authorized to pay to the city of Ava any part of the road tax collected within said city for the purpose of maintaining roads leading immediately into or through said city.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney-General

APPROVED:



J. E. TAYLOR
Attorney-General.

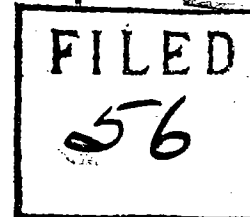
JEM/ld

OFFICERS:

County Coroner in 4th class county may serve simultaneously in office of police judge in 4th class city.

March 28, 1950.

Hon. Charles Ray Mabee,
Prosecuting Attorney
Putnam County,
Unionville, Missouri.



Dear Sir:

This is in reply to your request for an official opinion from this department, which reads as follows:

"Mr. Charles Fowler of this County, who is the duly elected, qualified and acting Coroner by virtue of election was recently nominated to the office of Police Judge of the City of Unionville, a city of the 4th class.

"The present incumbent, the County Court and the City Council have questioned the right of the nominee to serve in the event he is elected. I would appreciate an opinion as to whether there is any law prohibiting the same person from holding the office of County Coroner in a 4th class county, and at the same time holding the office of Police Judge in a 4th class city."

There is no constitutional or statutory prohibition providing that one individual shall not hold the office of County Coroner in a 4th class county and at the same time hold the office of Police Judge in a 4th class city. However, there is a common law doctrine one individual may not hold incompatible and inconsistent offices.

In the absence of direct or positive statutory prohibition against one individual holding the two offices in question, the common law rule must be adopted as reiterated by the Supreme Court of Missouri in the case of State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, wherein the question was whether the duties of the office of deputy sheriff and those of school director were so inconsistent and incompatible that they should not be held by the same person at the same time. The court stated at l.c. 330:

"The rule at common law is well settled that one who, while occupying a public office, accepts

another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first.* * *

And at l.c. 338, the court stated:

"* * * At common law the only limit to the number of offices one person might hold is that they shall be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Section 7122, R.S. Mo. 1939, provides for election of a police judge in cities of the 4th class, confers jurisdiction on such police judge to hear and determine all offenses against the ordinances of the city in which he is elected and provides "that when such police judges shall be so elected, then the jurisdiction in this article hereinafter conferred upon the mayor to hear and determine cases for the violation of city ordinances shall be held to refer to the police judge elected under this section."

The only inquiry is whether under the common law rule stated above the duties of the office of county coroner in a 4th class county and those of a police judge in a 4th class city are so inconsistent and incompatible as to render it improper that the same person hold both offices at the same time. In admeasuring the nature of the duties attendant to the offices in question we find those duties not to be inconsistent or incompatible. The office of police judge has the duty to hear and determine offenses against the ordinances of the city. The duties, powers and jurisdiction of the police judge in a 4th class city would not conflict with those of the county office of coroner in a 4th class county. We find no conflict of interest, as where one is subordinate to the other and subject to some degree of supervisory control of the other.

CONCLUSION.

Therefore, it is the opinion of this department the office of County Coroner in a 4th class county and that of Police Judge

in a 4th class city are not so inconsistent or incompatible
that sound public policy would make inappropriate the holding
of both of said offices at the same time by the same individual.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General.

APPROVED:

J. E. TAYLOR
Attorney-General

JEM/LD

COUNTY COURT: Official health center organization has exclusive
HEALTH: control over expenditure of moneys collected to the
credit of a county public health center, and upon
presentation of a properly authenticated voucher by
said organization, the county court must issue a
warrant.

January 10, 1950



Honorable Edgar Mayfield
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department
which in part reads:

"Your interpretation of Section 4 of House
Bill 280 as passed by the 63rd General
Assembly relative to the control of the
finances of a county health center is re-
quested. Your attention is respectfully
directed to the last sentence of Section
4, supra, which reads as follows: 'It
(the public county health center organiza-
tion) shall have exclusive control of the
expenditures of all moneys collected to
the credit of the Health Center Fund
provided that all moneys received for such
health center shall be deposited in the
treasury of the county to the credit of
the health center, and paid out only upon
warrants ordered drawn by the county court
of said county or counties upon the properly
authenticated vouchers of said official
organization.'

"Does the provision paid out only upon
warrants ordered drawn by the county court
give the county court a vested right to
control the fiscal policies of a public
health center formed under House Bill 280?
Does a county court have discretionary
powers under the above provision such that
the court may refuse to draw warrants upon
properly authenticated vouchers of the
county health center organization under
the grounds that the payment of such warrants
was not consistent with the county court's
opinion of the proper administration of
a public health center?"

House Bill No. 280, enacted by the 63rd General Assembly, is now incorporated in the Laws of Missouri, 1945, beginning at page 969, Sections 1 through 13, inclusive, Mo. R.S.A., Section 9854.101 through 9854.113, inclusive.

Section 9854.104, Mo. R.S.A., provides as follows:

"The location, building, maintenance and operation of said public county health center shall be vested in a bona fide organization of at least two hundred and fifty resident members, paying annual dues each of at least one dollar, be a corporate body, constitution and by-laws legally adopted and its officers legally elected and qualified, and when so formed, shall be the legal and official body in the county or counties for the promotion of health activities in said county or counties. It shall cooperate with the Division of Health of the Department of Public Health and Welfare or its successors and shall be empowered to enter into contracts and agreements with state and federal health authorities for the furtherance of all health activities, except as hereinafter prohibited. All personnel for the operation of the public health center shall be appointed and their compensation shall be fixed by the official organization. It shall have power to formulate, adopt and require such rules and regulations as may be needed for the operation of the center, not inconsistent with the laws of the state. It shall have exclusive control of the expenditures of all moneys collected to the credit of the health center fund provided that all moneys received for such health center shall be deposited in the treasury of the county to the credit of the health center, and paid out only upon warrants ordered drawn by the county court of said county or counties upon the properly authenticated vouchers of said official organization."

Basically, the question which you have presented calls for a determination as to which body has the ultimate power to control the expenditure of the moneys collected for the

county public health center fund as between the county court and the official health center organization.

In reading the above quoted section of the statutes, we note it provides that the official health center organization "shall have exclusive control of the expenditures of all moneys collected to the credit of a health center fund," and that said moneys which are to be deposited in the county treasury shall be paid out only upon warrants ordered drawn by the county court upon the properly authenticated vouchers of said official organization.

The language in the statute in referring to expenditure of moneys collected to the credit of the health center fund uses the term "exclusive control."

In Vol. 33, C.J.S., page 112, the word "exclusive" is defined as follows:

" * * * In its usual and generally accepted sense, as given by lexicographers, and in the ordinary speech of the people it means possessed to the exclusion of others; possessed and enjoyed to the exclusion of others; debarred from participation or enjoyment; not including, admitting, or pertaining to any other; * * * "

In the case of Temple Independent School District v. Proctor, 97 S.W. (2d) 1047, 1054, the Court of Civil Appeals of Texas, in considering the meaning of the term "exclusive control" as used in the statute giving a city adopting a home rule amendment exclusive control of the school system, said:

" * * * We think the language of subdivision 32 of article 1175, R.S., should be construed in the light of all these provisions, and carries with it the necessary implication that such 'exclusive control' means control to the exclusion of the control exercised by the county or state over other types of independent school districts authorized and provided for by the school laws; * * * "

By analogy, it would seem that the statute we are now considering gives the official health organization control over the expenditure of the health center moneys to the

exclusion of the control that the county court normally exercises over the expenditure of other funds.

In the case of State ex rel. Treasurer State Lunatic Asylum v. State Auditor, 46 Mo. 326, there was involved a proceeding in mandamus against the state auditor to require him to draw a warrant in favor of the asylum in accord with the requirements of an appropriation act. The manager of the asylum had drawn a requisition for making certain purchases and improvements in connection with the asylum that were authorized by law. In ordering the writ, the Supreme Court said at l.c. 327:

"The petition is demurred to, and the only question presented is whether the purchases and improvements in question are required, under the law, to be effected on credit or for cash in hand. The auditor's idea seems to be that the work, etc., is to be done on credit, and that he is to audit the bills, examining and passing upon the legality of the several items thereof, prior to the payment. The law does not impose upon him that burden. It intrusts the expenditure of the fund to the good faith and official responsibility of the asylum managers, who are the State's trustees, and who are accountable to the State for the expenditure of the fund intrusted to their hands in accordance with the requirements of the act of appropriation. The appropriation act contemplates but one requisition and one warrant. Its command is: 'The State auditor is hereby authorized and required to draw his warrant for the above sums of money appropriated, on the requisition of the board of managers of the State lunatic asylum.' It is not for the auditor to go back of the requisition."

The case we have found most nearly in point with the situation which you have presented is State ex rel. Holman v. Trimble, 293 S.W.98, 316 Mo. 1041. In this case the Supreme Court was considering the identical question which you have presented in a situation involving a dispute between the county court of Callaway County and the trustees of the county hospital concerning the expenditure of hospital funds collected and deposited in the county treasury. Even the relevant statutes

then before the court were similar to those relating to the public health center which we are now considering. Regarding the facts the hospital trustees had requested the county court to draw a warrant in favor of a person who had performed work and labor in the erection of the hospital. The county court refused to draw the warrant and a petition in mandamus was filed. In ruling on the question, the court at S.W. l.c. 101, said:

"The section then provides that trustees shall receive no compensation; that they shall adopt by-laws, rules, and regulations for their own guidance.

"'They shall have the exclusive control of the expenditure of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites,' for the 'construction of any hospital building or buildings,' etc.

"And then:

"'Provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of' the treasurer of 'the hospital fund, and paid out only upon warrants * * * drawn by the county court * * * upon the properly authenticated vouchers of the hospital board.'

"The Court of Appeals construed these statutes to mean that hospital trustees have exclusive control of the expenditure of moneys collected to the credit of the hospital fund. The natural interpretation of that language excludes the intervention of any other official in determining what claims are to be paid and what accounts ought to be allowed. The plain words mean that full discretion is vested in the hospital board to pass upon and determine the validity of every claim presented. Relators call attention to the provision that the money must be deposited in the treasury of the county and must be paid out only upon warrants drawn by the county court, and argue that the county court is thus vested with some discretion, some function to determine whether or not the claims presented

are valid, but the same sentence of the statute goes on to say that such payments are made upon properly authenticated vouchers of the hospital board. That seems to leave no doubt that the only judgment exercised by the county court is to determine whether the vouchers presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. * *"

Considering the above decision and its application to the question which you have presented, it would seem that the natural interpretation of the language of Section 9854.104, supra, vesting exclusive control of the expenditure of moneys collected to the credit of the health center in the health center organization, excludes the intervention of any other official or body in determining what claims are to be paid and what accounts are to be allowed. It appears that the full discretion is vested in the health center organization to pass upon and determine the validity of every claim presented, and it is the duty of the county court when a properly authenticated voucher is presented to it by said organization to issue a warrant therefor, and the only judgment that the county court may exercise is to determine whether the vouchers presented show proper authentication of the health center organization and whether they are for purposes within control of the health center organization as are set out in the statute.

CONCLUSION

It is therefore the opinion of this department that the county court has no control over the expenditure of moneys collected to the credit of the county public health center, but that said control over the expenditure of these moneys is exclusively vested in the health center organization. When the county court receives a properly authenticated voucher from the official health center organization to cover an expenditure for a purpose within the control of said organization, then a warrant must be issued.

Respectfully submitted,

APPROVED:

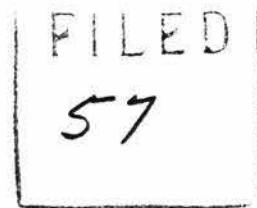
RICHARD F. THOMPSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

JET:VLM

SCHOOLS: State Board of Education may adopt regulation requiring school buses to be painted yellow.

January 26, 1950



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge your request for an opinion of this office in which you inquire if the Attorney General, State Highway Patrol or State Board of Education could issue an order or directive that school buses be painted yellow.

Section 1 of House Bill No. 69, enacted by the 65th General Assembly, now incorporated in Missouri Revised Statutes Annotated as Section 10327.1, provides in part as follows:

"B. Every bus used for the transportation of school children shall bear upon the front and rear thereon a plainly visible sign containing the words 'school bus' in letters not less than 8 inches in height. Each bus shall have lettered on the rear in plain and distinct type the following: 'State Law: stop while bus is loading and unloading.' Each school bus subject to the provisions of this act shall be equipped with a mechanical or electrical signalling device, which will display a signal plainly visible from the front and rear and indicating intention to stop."

While the above quoted section does provide that school buses must have the required lettering warning motorists to stop when the bus is loading and unloading, we find no provision in the statute requiring that the school buses must be painted a certain color.

However, your attention is further directed to Section 2 of House Bill No. 69, Section 10327.2 Mo. R.S.A., which provides as follows:

Hon. G. Logan Marr

"A. The state board of education shall adopt and enforce regulations not inconsistent with law to cover the design and operation of all school buses used for the transportation of school children when owned and operated by any school district or privately owned and operated under contract with any school district of this state, and such regulations shall by reference be made a part of any such contract with a school district. Every school district, its officers and employees, and every person employed under contract by a school district shall be subject to such regulations. The State Board of Education shall cooperate with the State Highway Department and the State Highway Patrol in placing suitable warning signs at intervals on the highways of the State.

"B. Any officer or employee of any school district who violates any of the regulations or fails to include obligation to comply with such regulations in any contract executed by him on behalf of a school district shall be guilty of misconduct and subject to removal from office or employment. Any person operating a school bus under contract with a school district who fails to comply with any such regulations shall be guilty of breach of contract and such contract shall be cancelled after notice and hearing by the responsible officers of such school district."

Under the above quoted section, the State Board of Education is given the power to adopt and enforce regulations to cover the design and operation of all school buses used for the transportation of school children, and we do not believe that a regulation adopted by the State Board of Education that school buses be painted yellow would be inconsistent with law. We believe that if such a regulation were adopted it would be for the purpose of safeguarding the school children who ride in the buses and that the adoption of such a regulation would fall within the ambit of authority conferred upon the State Board of Education by the above quoted section.

Hon. G. Logan Marr

CONCLUSION

It is therefore the opinion of this department that the State Board of Education, under the powers given it by law, could adopt and enforce a regulation requiring that school buses used for the transportation of school children must be painted yellow.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

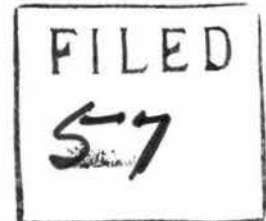
J. E. TAYLOR
Attorney General

RFT:VLM

SHERIFFS: Sheriff entitled to five cents per mile for serving
OFFICERS: subpoenas in Christian county for a misdemeanor trial
in Douglas County; entitled to five cents per mile for
transporting prisoner from one county to another;
deputy sheriff not entitled to keep any pay for taking
prisoner to penitentiary, but guard, not deputy sheriff,
entitled to keep such pay.

February 23, 1950

Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting
an official opinion of this department, and reading as follows:

"A number of questions have arisen regard-
ing the sheriff's office which I would
like to have your opinion on.

"1. A man is arrested for a misdemeanor
in Douglas County, the case comes for
trial and a number of witnesses are
ordered to be subpoenaed in Christian
County. The Christian County Sheriff
serves them. The question then arises;
Should the Sheriff collect off of the
Christian County court and hope that
the county will be repaid? Suppose the
defendant is convicted. What happens
then? I maintain the sheriff should
send his bill to the county ordering
the witnesses and should never collect
off of Christian County unless it is a
Christian County case.

"2. A defendant is in jail in Stone
County. He is also wanted for trial in
Christian County. The court orders the
Stone County sheriff to bring the pris-
oner to court in Christian County for
trial and after the trial orders defend-
ant taken back to Stone County. Should
the Stone county Sheriff bill Christian
County for 10¢ per mile and turn the
full amount to Stone County, billing

Honorable Gordon J. Massey

Stone County for 5¢ per mile, or should he make his bill for 5¢ per mile to Christian County or for criminal work for some other does he get 10¢ per mile?

"3. The sheriff takes a prisoner to the penitentiary. The court allows an extra guard. Your recent opinion holds that if the paid deputy takes the trip with the sheriff he shall get nothing. (A) Is it the duty of the sheriff to take the paid deputy? (B) Can he take another deputy, not paid or some individual as a guard and if he does take someone other than the paid deputy, what allowance does the state allow such deputy and to whom should the pay for such guard be paid? The guard, the sheriff or to the county?"

Section 5, Laws of Missouri, 1945, page 1547, applicable to fourth class counties, of which Christian is one, provides as follows:

"In addition to the salary provided in Section 1 of this act, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

This section plainly puts upon the County Court of Christian County the obligation of paying the Sheriff of Christian County for serving subpoenas for witnesses for a trial of a misdemeanor case in Douglas County. Such section also places upon the County Court of Stone County the obligation of paying the Sheriff of Stone County for transporting, upon order of the court, a defendant from Stone County to Christian County and return. In both the cases listed above the sheriff is to collect the criminal costs assessed in such cases and turn over all such costs to his county court under the provisions of Section 3, Laws of Missouri, 1945, page 1547, reading as follows:

"It shall be the duty of the sheriff in counties of the fourth class to charge and collect in all instances every fee, both civil and criminal, including mileage,

Honorable Gordon J. Massey

accruing to his office by law, except such criminal fees as are chargeable to the county, and such sheriff shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating for what act or service said fees were charged and collected, together with the names of the state or counties on change of venue cases or persons paying or who or which are liable for same, which report shall be verified by the affidavit of such sheriff. It shall be the duty of such sheriff upon the filing of said report to forthwith pay over to the county treasurer all fees arising in connection with the investigation, arrest, prosecution, custody, care, commitment and transportation of persons accused of or convicted of a criminal offense or offenses, during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and one in the office of the clerk of the county court and every such sheriff shall be liable on his official bond for all such criminal fees collected and not accounted for by him and paid into the county treasury; provided that he shall retain all fees collected by him in civil matters."

We see no conflict between the collection of mileage by the sheriff and the collection by the sheriff of criminal costs and the subsequent turning over by the sheriff of such criminal costs to the county court of the county of which he is sheriff.

With reference to your question as to the transportation of a prisoner to the penitentiary, we are enclosing copy of an official opinion of this department rendered under date of December 20, 1949, to Honorable J. L. Sturgis, Ass't. Prosecuting Attorney of Greene County. You will note that the conclusion of such opinion is based upon the provisions of Section 13 Article VI of the Constitution of Missouri, which section applies both to deputies who are paid as well as to those who are not paid, since deputy sheriffs obviously are officers. A guard who is not a deputy sheriff is entitled to the pay provided for a guard in Section 13413, R. S. Mo. 1939, quoted on page 3 of the enclosed opinion. We find no

Honorable Gordon J. Massey

requirement in the law making it necessary for the sheriff to take a paid deputy sheriff as the guard when he takes a prisoner to the penitentiary and the circuit court authorizes the sheriff to have a guard therefor.

CONCLUSION

It is the opinion of this department that:

(1) The sheriff of Christian county who serves subpoenas for witnesses in Christian County for a misdemeanor case to be tried in Douglas County is entitled to five cents per mile, to be allowed by the Christian County Court for such service.

(2) The Stone County Sheriff who transfers a defendant, pursuant to order of the court, from a jail in Stone County to Christian County, and after trial of such defendant transports such defendant back to Stone County, is entitled to be allowed five cents per mile for such transportation by the Stone County Court.

(3) When a sheriff is allowed by the circuit judge a guard for a prisoner to be taken to the penitentiary, the guard is not entitled to retain the compensation provided in Section 13413, R. S. Mo. 1939, if such guard is a deputy sheriff, but is entitled to retain such compensation if such guard is not a deputy sheriff. There is no requirement that the sheriff take a paid deputy sheriff as such guard.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:ml

Enclosure

MAGISTRATES:
CHANGE OF VENUE:
CRIMINAL COSTS:

When a change of venue is granted from magistrate in misdemeanor case the defendant is not required to pay any costs until after trial and conviction.



February 27, 1950

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

"Every time, we have a misdemeanor case for trial in the local magistrate court, and the judge is sworn off the bench by an affidavit of bias and prejudice, the Court, immediately taxes the costs to date against the defendant, and requires the defendant to pay the costs accrued before the change of venue is granted, and threatens to issue a commitment against defendants and jail them for non-payment of costs; and in one case did issue an execution and garnishee the bank account of a defendant, who swore the magistrate off the bench.

"Now I want an opinion outlining the procedure in the magistrate court on such a matter, and of course that calls for an interpretation of the statutes.

"In Laws of 1945 at page 755, sec. 16, in criminal procedure in magistrate courts, a change of venue is governed by the same laws as for change of venue in civil matters in magistrate courts.

"In the Laws of 1945 at page 791, sec. 80, in civil procedure, the lia-

February 27, 1950

bility of parties who take a change of venue is outlined, and the costs are to be taxed at the time of the change of venue and included in the transcript of the case sent on the change of venue."

Section 16, Laws of Missouri, 1945, page 750, provides as follows:

"The defendant shall be entitled to a change of venue under the same conditions as provided for a change of venue from magistrate courts in civil cases and the procedure for change of venue provided in such cases shall be followed."

The procedure for change of venue provided in civil cases is found in Sections 76, 77, 78, 78a and 79, Laws of Missouri, 1945, page 765.

Section 80, Laws of Missouri, 1945, page 765, providing as follows:

"When a change of venue is taken by the defendant, or by the plaintiff after the defendant has had a change of venue, such plaintiff or defendant shall be taxed with the costs which have accrued for witnesses and service thereof, and witness fees, in preparing for trial at the time and place fixed therefor, and the costs of the magistrate for transferring the cause to the other magistrate or circuit court and when taken by the plaintiff from the magistrate before whom he commenced his suit, he shall be taxed with all the costs which have accrued and shall accrue in the cause until the transcript and papers shall be delivered to the magistrate or circuit clerk, as the case may be, to whom the cause is sent for trial."

is not part of the procedure for change of venue, but relates only to the taxing of costs in civil cases when a change of venue is granted.

The provisions for assessing costs against a defendant in criminal cases are found in Section 25, Laws of Missouri, 1945, page 750, which provides as follows:

Honorable G. Logan Marr

February 27, 1950

"Whenever the defendant shall be tried and found guilty, either by the magistrate or a jury, or shall enter a plea of guilty, and a fine shall be assessed, the magistrate shall enter judgment against the defendant for such fine, and if the punishment shall be imprisonment in the county jail, or shall be both a fine and imprisonment, the magistrate shall enter judgment according to the finding of the court or verdict of the jury, and immediately commit the defendant to the county jail for the time designated in the judgment, and the defendant shall be adjudged to pay the costs, and may be committed to the county jail until the judgment for both fine and costs shall be paid, or until he shall be discharged therefrom under the provisions of the next succeeding section."

Since such provision provides that the costs are to be assessed against a defendant and collected in criminal cases only if such defendant is tried and convicted, it is our view that the collection of criminal costs, including costs which have accrued prior to change of venue, are collectible from the defendant only after a defendant has been tried and convicted.

CONCLUSION

It is the opinion of this department that criminal costs, including costs accrued prior to a change of venue granted a defendant in a misdemeanor case in magistrate court, can be taxed against and collected from a defendant only after he has been tried and convicted.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:lrt

TAXATION: Personal property in county under township organization assessed in township in which owner resides.

March 10, 1950

FILED

57

Honorable W. V. Mayse
Prosecuting Attorney, Harrison County
Bethany, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would like an opinion, as soon as possible, on the following question:

"In a County, such as our own, a third class County with township organization, is tangible personal property to be assessed in the township where located or in the township where the owner resides? In using the word owner in this question, I refer to individuals and not the business Corporations. Please advise."

Section 14002, R.S.Mo. 1939, provides:

"All personal property shall be assessed annually; real property shall be assessed as provided by law."

Section 14003, R.S.Mo. 1939, provides:

"All real property shall be assessed in the township in which the same is situated, with the owner's name thereof, if known; if the owner's name is not known, then it shall be assessed as nonresident."

Section 14005, R.S.Mo. 1939, reenacted Laws of Mo., 1945, p. 1970, provides:

"The assessor, or some suitable person empowered by him, shall, within the time prescribed by law, and after being furnished with

March 10, 1950

Honorable W. V. Mayse

the necessary blanks proceed to take a list of the taxable property of his township and assess the value thereof in accordance with the provisions of the general laws of this state in relation to the assessment of real and tangible personal property by county assessors, in all things pertaining to the discharging of his official duties, except when the same may be inconsistent with the provisions of this article: Provided that in counties under township organization the assessor shall not be required to give bond and his compensation shall be such as is provided in this article for his services."

The above-quoted provisions are found in Article 12 of Chapter 101, R.S.Mo. 1939, relating to the assessment of property in counties under township organization. No express statutory provision is made regarding the place of assessment of personal property located in a township other than that of the residence of the owner in a county under township organization.

Section 8 of an act found in Laws of Mo., 1945, p. 1799, provides:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

Section 10395, R.S.Mo. 1939, reenacted Laws of Mo. 1945, p. 1629, relating to school district taxes, contains the following provision:

"* * * and it shall be the duty of the county assessor in listing personal property to take the number of the school district in which the taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

March 10, 1950

Honorable W. V. Mayse

In the case of State ex rel. Kelly v. Shepherd, 218 Mo. 656, l.c. 663, the court stated:

"It is conceded by counsel for both appellant and respondent that personal property is taxable at the domicile of the owner and in the school district in which he resides."

In 61 C.J. Taxation, p. 521, sec. 635, the following rule is stated:

"In the absence of statutory or constitutional provisions to the contrary, usually personal property, both tangible and intangible, has its situs for taxation at the place of domicile or residence of the owner, or of which he is an inhabitant, and not elsewhere, * * *."

We feel that the statutes show a design on the part of the Legislature to make all personal property taxable at the place of residence of the owner. Section 14005, supra, applicable in counties under township organization, provides that the township assessor shall make his assessment in accordance with the general laws of the state in relation to the assessment of real and personal property by county assessors. A county assessor may assess only the personal property of persons residing within the county. He has no jurisdiction to assess the personal property owned by persons residing outside the county. The same limitation is, we feel, applicable to a township assessor insofar as personal property owned by persons residing without his township is concerned.

CONCLUSION

Therefore, this department is of the opinion that in a county under township organization, tangible personal property is assessed in the township in which an individual owner resides,

March 10, 1950

Honorable W. V. Mayse

rather than in the township in which the property is situated, where the residence of the owner and location of the property are not in the same township.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General

CORONERS:

COMPENSATION: MILEAGE, RIGHT TO:

Coroner of third class county entitled only to compensation and mileage for services provided by Sections 13259.4 and 13259.5, Mo. R.S.A. 1939. Must pay all fees accruing in office to county treasurer.

March 17, 1950

Mr. W. V. Mayse
Prosecuting Attorney
Harrison County
Bethany, Missouri



Dear Sir:

This is to acknowledge receipt of your recent letter requesting a legal opinion on the facts stated therein. Said letter reads as follows:

"Would you please furnish me an opinion from your office on the following questions:

- (1) Does a Coroner in third class counties receive any compensation besides that allowed by Section 13,259.4?
- (2) Under the provisions of Section 13,259.6, does a Coroner have to return to the county all fees he receives, other than his salary, or may he retain some fees and if so what fees and by authority of what Section or Sections of our law in this state?"

Section 13259.4, Mo. R.S.A. 1939, referred to in paragraph Number (1) of your letter, reads as follows:

"The coroner in all counties of the third class shall receive for his services annually, payable out of the county treasury in equal monthly installments the following: In counties with a population of less than 10,000 the sum of \$120.00; in counties with a population of 10,000 and less than 15,000, the sum of \$180.00; in counties with a population of 15,000 and less than 20,000, the sum of \$240.00; in counties with a population of 20,000 and less than 24,000 the sum of \$360.00; in counties with a population of 24,000 and less than 30,000 the sum of \$480.00; and in counties having a population of 30,000 and more the sum of \$600.00."

Mr. W. V. Mayse

Section 13259.6, referred to in paragraph Number (2) of your letter reads as follows:

"It shall be the duty of the coroner in counties of the third class to charge and collect in all instances every fee accruing to his office by law; except such fees as are chargeable to the county and such coroner shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating on what account said fees were charged and collected, together with the names of persons paying or who are liable for the same, which report shall be verified by the affidavit of said coroner. It shall be the duty of said coroner, upon the filing of such report, to forthwith pay over to the county treasury all fees required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and one in the office of the clerk of the circuit court, and every such coroner shall be liable on his official bond for all such fees collected and not accounted for by him and paid by him to the county treasury."

Under the provisions of Section 13259.4, supra, "The coroner in all counties of the third class shall receive for his services annually, payable out of the county treasury in equal monthly installments the following: * * *" it is noted that amounts to be paid vary according to the population of such county, and ranges from \$120.00 in those counties having a population of 10,000, to \$600.00 in other counties having a population of more than 30,000 inhabitants.

It appears that Harrison County is a county of the third class and according to the last decennial census report contained 16,525 inhabitants. Under the provisions of Section 13259.4, supra, the coroner of your county would be entitled to an annual salary of \$240.00 to be paid to him out of the county treasury in equal monthly installments in the sum of \$20.00 each.

Section 13259.5 Mo. R.S.A. 1939, provides that the coroner shall under the circumstances referred to in said section be entitled to mileage and reads as follows:

"The county court shall allow the coroner, payable at the end of each month out of the county treasury, five cents per mile for each mile actually and necessarily travelled in the performance of his official duties."

Mr. W. V. Mayse

We are unable to find any statute or court decisions in Missouri, defining the term "mileage" and since we find it necessary to define such term and the use of same in the discussion of the facts before us, we turn to the court decisions outside of Missouri for a good definition of said term.

In the case of Richardson vs. State, 66 Ohio St. 108, the court said:

"'Mileage' is defined in the Century Dictionary as payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over. The same definition substantially is found in Bouvier's and other law dictionaries."

In the case of Caswell vs. New York Cent. R. Co., 248 N.W. 641, 1.c. 642, the court said:

"'Mileage' is a well-established method widely used in public and private business of reimbursing an officer or employee for the expense necessarily sustained by him in traveling to perform his duties. 'Mileage' is merely a substitute for actual expenses, and theoretically covers only the cost of transportation * * *"

Again, in the case of United States vs. Smith (1895) 158 U.S. 346, 1.c. 349, 350, the court said:

"1. The first item relates to the allowance of the claim for mileage. While an allowance for travel fees or mileage is, by section 823, included in the fee bill, we think it was not intended as a compensation to a district attorney for services performed, but rather as a reimbursement for expenses incurred, or presumed to be incurred, in travelling from his residence to the place of holding court, or to the office of the judge or commissioner. * * * And while, in some cases, it may operate as a compensation, it is not so intended, and is not a fee, charge, or emolument of his office within the meaning of section 834. It is much like the arbitrary allowance for the attendance of witnesses and jurors, which may or may not be sufficient to pay their actual expenses, depending altogether upon the style in which they choose to live."

Mileage was defined as follows in 40 Corpus Juris, page 658; Note 50(a):

Mr. W. V. Mayse

"Mileage . . . is a recompense to the sheriff for the expense and labor of the travel which he has to perform in serving the process of the court. It can hardly perhaps be called a fee; it seems rather an equivalent or reimbursement for toil or travel actually undergone."

In the foregoing definitions of the term "mileage" it is noted that where "mileage" is paid to a public official by the proper governmental authority responsible for such payment, that such mileage is not considered as a part of the compensation paid for services rendered, but rather mileage fees are treated as reimbursement paid the officer for funds he has found it necessary to expend for travelling expenses incidental to the performance of his official duties.

In connection with the discussion of the definition of "mileage" we desire to call further attention to the sections quoted above. We note that Section 13259.5 or the "mileage section" is separate from and immediately follows Section 13259.4, or the "salary section." We therefore conclude that it was the intention of the legislature in the enactment of these laws that the coroner should receive mileage fees at the rate of five cents per mile for each mile actually and necessarily travelled while engaged in the performance of his official duties and that such mileage fees were to be in addition to his annual salary and that such fees are not to be considered as a part of the annual compensation for services rendered but as a reimbursement for travelling expenses borne by him.

Section 13259.6 relating to the collection and disposition of coroner's fees reads as follows:

"It shall be the duty of the coroner in counties of the third class to charge and collect in all instances every fee accruing to his office by law; except such fees as are chargeable to the county and such coroner shall, at the end of each month, file with the county court a report of all fees charged and collected during said month, stating on what account said fees were charged and collected, together with the names of persons paying or who are liable for the same, which report shall be verified by the affidavit of said

Mr. W. V. Mayse

coroner, It shall be the duty of said coroner, upon the filing of such report, to forthwith pay over to the county treasury all fees required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and one in the office of the clerk of the circuit court, and every such coroner shall be liable on his official bond for all such fees collected and not accounted for by him and paid by him to the county treasury."

We feel that within the meaning of this section it is quite obviously the duty of the coroner of a third class county to charge and collect every fee allowed by law to be charged and collected for by such coroner. Only fees chargeable to his county are excepted. None of the fees so collected belong to or may be retained by the coroner but it is his further duty to file a monthly report of fees collected and to pay over all such fees to the county treasurer. The detailed procedure for the filing of the report and the payment of the fees is provided in above section and it is further noted that for a failure to perform the duties mentioned, the coroner shall be liable on his official bond.

We therefore submit that in answer to your inquiries:

(1) That a coroner of a third class county is entitled to receive only that compensation for his services provided by Section 13259.4, supra. That Harrison County, according to the last decennial census report has a population of 16525 and the coroner of said county is entitled to receive the sum of \$240.00 annually as payment in full for services rendered, and that said sum shall be paid to him in twelve monthly installments of \$20.00 each. That in addition to said annual salary such coroner is, under the provisions of Section 13259.5, entitled to receive travelling expenses at the rate of five cents per mile for each mile actually and necessarily travelled by him in the performance of his official duties. That the coroner of a third class county is not entitled to receive any other compensation or expenses than that mentioned in the preceding paragraph.

(2) That under the provisions of 13259.6, supra, it is the duty of a coroner of a third class county to charge, collect, and report every fee accruing to his office that may be legally charged and collected for by him, except those fees chargeable to his county. That none of said fees collected may be retained by the coroner as

Mr. W. V. Mayse

his own, there being no section of the statutes which would authorize such action but all such fees must be paid into the county treasury by him.

CONCLUSION

(1) It is therefore the opinion of this department that a coroner of a third class county shall receive for his services annually such sum as may be due him under the provisions of Section 13259.4, Mo. R.S.A. 1939, and that in addition thereto he shall also receive travelling expenses at the rate of five cents per mile for each mile actually and necessarily travelled in the performance of his official duties as provided by Section 13259.5, Mo. R.S.A. 1939.

(2) It is the further opinion of this department that a coroner of a third class county is not entitled to any other remuneration than the salary and mileage noted above, and that it is the duty of such coroner to charge, collect, report and to pay over all fees so collected to the county treasurer of his county except such fees that are chargeable to said county. That the coroner may not retain as his own any of the fees so collected but must pay them into the county treasury, and for a failure to duly account for and pay over said fees said coroner will be liable on his official bond.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

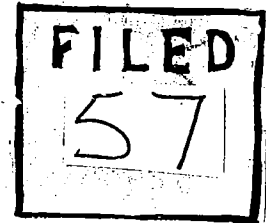
APPROVED:

J. E. TAYLOR
Attorney General

DIVISION OF HEALTH:
FUNDS: VITAL STATISTICS:

All funds received by the Division of Health must be deposited in the state treasury.

March 29, 1950



Honorable Samuel Marsh
Director, Department of Public
Health and Welfare
Jefferson City, Missouri

Dear Sir:

I.

We received a request from you for an opinion from this department upon the following statement of facts:

"During the interval between the death of Dr. Adams and the appointment of a new division director for the Division of Health, I assumed direct supervision over the Division of Health.

"One of the items that came to my notice was that for many years the Directors of the Division of Health have entered into contracts on an individual basis with the National Office of Vital Statistics of the United States Public Health Service of the Federal Security Agency in Washington, D.C. to furnish certain data from the records of the Bureau of Vital Statistics of the State Division of Health.

"Under these contracts the funds received for that service were deposited in a checking account in the Central Missouri Trust Company in the individual name of the division director, and out of that fund the division director paid the salaries of certain employees who were engaged by the Division Director to do the necessary work to fulfill the contract with the Federal Agency.

"When this contract came up for renewal Dr. Adams, the then Director of the Division of Health, signed the contract as follows:

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"Missouri Division of Health
C. F. Adams, M.D., Acting Director"

"However he continued to maintain the account in the Central Missouri Trust Company, but the name of the account was changed from Dr. R.M. James, Agent, to Missouri Division of Health, C. F. Adams, M.D., Director. Dr. Adams continued to pay the salaries of the employees who were doing the work out of this account, but these particular employees were never brought under the State Merit System Law."

"I would like your opinion as to how these funds should be handled."

II.

The Constitution of 1945, Article III, Section 36 provides, in part, as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:"

* * * * *

The Constitution of 1945, Article IV, Section 28, provides as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general

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accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Section 22 of Article IV, Constitution 1945, provides that all taxes, licenses and fees payable to the state shall be collected by the Division of Collection of the Department of Revenue.

Section 9759.20 R.S.A., Laws 1945, page 945, Section 20, provides as follows:

"It shall be the duty of the division of health to have charge of the state system of registration of births and deaths; to prepare the necessary methods, forms and blanks for obtaining and preserving such records, and to insure the faithful registration of the same in the registration districts and in the central bureau of vital statistics at the capital of the state. The said division shall be charged with the uniform and thorough enforcement of the said law throughout the state and shall, from time to time, promulgate any additional forms and amendments that may be necessary for this purpose. Suitable provision shall be made, including fireproof vaults and filing cases, for the permanent and safe preservation of all official records and other matters pertaining to vital statistics for which the bureau of vital statistics may be responsible."

Section 9783.18, R.S.A., Laws 1947, Vol. 2, page 237, Section 19, provides that the fees charged by the state registrar for birth or death certificates shall be paid by the applicant to the State Department of Revenue.

The Supreme Court in the case of Moore v. Brown, 350 Mo. 256, 165 S.W.(2d) 657, held that Section 43 of Article IV of the Constitution of 1875 requires that all revenue collected and moneys received by the state from any source whatsoever shall go into the treasury and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury except in pursuance of regular appropriations made by law.

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The Supreme Court of Missouri in *Howell v. Division of Employment Security*, 215 S.W.(2d) 467, fully considered the provisions of the Constitution of 1945. In this case they held that the word revenue means the annual and current income of the state, however, derived, which is subject to appropriations for general public uses:

"* * *The annual and current income of the state, however derived, which is subject to appropriation for general public uses. This excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use, or which is not required to be paid into the state revenue fund but into a special fund. * * *"

Section 9735a R. S. Mo. 1939, provides as follows:

"The State Board of Health is hereby directed to comply with the provisions of any act of Congress providing for the distribution and expenditure of funds of the United States appropriated by Congress for Health purposes and to comply with any of the rules or conditions made by the United States Public Health Service, The Children's Bureau or any other Federal Agency in regard to health funds distributed to the states, and to comply with any of the rules and conditions made by said services or bureaus or other branches of the United States Government acting under the provisions of the Federal law in order to secure for the State of Missouri funds allotted to this state by the United States Government or health purposes under the provisions of such acts of Congress, relating to health; said funds shall be received by the State Treasurer and deposited in separate funds to be known as the United States Public Health Title VI fund, the Venereal Disease Control fund, the Children's

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Bureau fund, and any other fund specially designated by a Federal Agency for the use of the State Board of Health for health purposes, and to be paid out by the State Treasurer on requisitions drawn by the executive officers of the State Board of Health on a warrant of the State Auditor. Said funds being allotted to the State of Missouri for health purposes by the Federal Government the General Assembly shall appropriate the same to the use of the State Board of Health, under such provisions as are set out for the reception and use of funds by the Federal Government. Added Laws 1941, p. 370, Sec. 1."

This section was in force at the time of the making of the attached contract, to which you refer in your letter. Said section has been repealed by Senate Revision Bill No. 1051 and in lieu thereof Section 3 at page 972 of Laws 1945, has been substituted therefor in the revision laws. This revised section is not as broad as Section 9735a.

Section 6.060 of R.B. No. 27 of the 65th General Assembly provides as follows:

"In order to secure to the state federal funds allotted or available, the Director of the Division of Health, the State Comptroller, and the State Treasurer, respectively, are hereby authorized and directed to receive, deposit, expend and dispense any allotments, advancements, grants, or contributions of federal funds as United States Public Health Service Title VI funds, Venereal Disease Control Funds, Children's Bureau Title V, Part I, funds or any other federal health funds, for health purposes, and to comply with the provisions of any act of Congress, or with any rule, regulation or condition of any agency of the United States acting under the provisions of federal law providing for the allotment and expenditure of such funds; and should any such act, rule, regulation or condition require the deposit of any such funds in the State Treasury or in a trust fund or with the Division of Health, State Comptroller or Treasurer, as trustee, then the said Division of Health, State Comptroller and Treasurer are hereby authorized

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and directed to receive, deposit and expend such funds in the manner required by such act, rule, regulation or condition, and all such funds so deposited shall stand and are hereby appropriated to said Division of Health, State Comptroller and Treasurer to be applied in the manner and for the purposes set forth in such act, rule, regulation or condition. When required by such act, rule, regulation or condition, the State Auditor is hereby authorized and directed to audit and issue warrants for, the State Treasurer is hereby authorized and directed to receive, deposit and handle, as trustee or otherwise, any such funds and to pay out same, all in the manner required by such act, rule, regulation or condition; and for such purposes there is hereby appropriated all such federal funds so deposited in the State Treasury for the biennial period beginning July 1, 1949, and ending June 30, 1951, the amount hereby appropriated, being in addition to all other appropriations made by this act."

Section 6.060 of H.B. 27, quoted on page 5 of this opinion, provides that allotments, advancements, grants or contributions of federal funds stand appropriated to the Division of Health. If this provision of an appropriation Act were to be held valid the moneys involved under the attached contract still would not be allotments, advancements, grants or contributions of federal funds because the money is paid for services rendered, and therefore the section or statute cannot be construed to apply. Section 9735a, quoted above in this opinion, would not apply for the same reason, and also would not apply because it will be repealed effective April 14, 1950. The attached contract, in our opinion, provides that in return for so much money per name, to be paid by the federal government, the Missouri Division of Health agrees to perform certain services so that this contract is no different from any other contract that the state of Missouri might enter into with the federal government or any individual. The money paid for this service cannot be deemed to be a special fund allotted or allocated to Missouri and the Division of Health by the federal government.

But it is clear to us that under the constitutional provision cited above, it is the duty of the Division of Health to pay to the treasury of the state of Missouri the money received from the United States Public Health Service for said services

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in connection with this attached contract.

The responsibility to see that this payment is made rests upon you and the Director of the Division of Health.

CONCLUSION

It is the conclusion of this department that all monies received from the United States Public Health Service for data and information furnished to said federal government agency from the records of the Bureau of Vital Statistics of the Division of Health in accordance with the terms of the attached contract shall be deposited in the state treasury and that said monies are not appropriated by any existing law.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

SJM:mw

Federal Security Agency
U. S. PUBLIC HEALTH SERVICE
National Office of Vital Statistics

Contract No. 40005

Date July 1, 1949

CONTRACT FOR MICROFILM

For and in consideration of the payment of three cents (\$0.03) for a complete positive microfilm copy of each birth, death, and stillbirth certificate furnished during the current fiscal year, in accordance with U.S. Public Health Service specifications as issued annually, the undersigned bidder offers and agrees to furnish to the United States Government, as represented by the U. S. Public Health Service, positive microfilm copies of certificates of births, deaths and stillbirths which will have occurred on or after January 1, 1946, in the State of Missouri.

It is understood that this agreement does not cover copies of certificates for which payment has been made; that the Government, upon 30 days' advance notice to the contractor, may renew the contract from fiscal year to fiscal year for a period not to exceed five (5) years under the terms and conditions herein specified; that the contract may be terminated at any time by either party upon 10 days' notice, that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom unless it is made with a corporation for its general benefit; and that the contractor and any subcontractor shall not discriminate against any worker because of race, creed, color, or national origin.

Other exceptions and provisions: The undersigned bidder agrees to furnish positive microfilm copies of certificates of births, deaths and stillbirths occurring in 1948 for which payment has not been made.

State Office Bldg.
Bidder: Missouri Division of Health. Address: Jefferson City, Mo.
(Name of State agency)

By: s: C. F. Adams, M.D. Acting Director Division of Health
C. F. Adams, M.D.

ACCEPTED BY THE UNITED STATES
PUBLIC HEALTH SERVICE

Date July 1, 1949

By R. M. Harvey, Acting Chief, Office of Purchase and Supply
(Name and title of official)

DIVISION OF WELFARE:
AID TO DEPENDENT CHILDREN:

Division of Welfare shall not accept any statements or certificates from physicians, clinics or other authorities as to the physical or mental incapacity of the parent unless such authorities have been designated by the Division of Welfare to examine the parent. Their statements or certificates of unauthorized examinations of a parent cannot be considered upon appeal.

SEE LETTER ATTACHED MODIFYING
OPINION AS RELATING TO DEPT.
PUBLIC HEALTH AND WELFARE
DIRECTOR ON APPEAL.

April 21, 1950



Honorable Samuel Marsh
Director, Department of
Public Health and Welfare
Jefferson City, Missouri

Dear Sir:

This department acknowledges receipt of your request for an official opinion on the following questions:

"Section 9408 of the Missouri Revised Statutes
Annotated provides as follows:

'Section 9408. Aid to dependent children shall be granted to a parent or other relative as herein specified for the benefit of any child who' * * *(2) has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent * * * and provided further that when benefits are claimed on the basis of physical or mental incapacity of a parent, the probable duration of the physical or mental incapacity must be three months or more and if the incapacity is not obvious, such incapacity shall be certified to by a competent and appropriate authority designated by the Division of Welfare. Benefits may be granted and continued for this reason only while it is the judgment of the Division of Welfare that a physical or mental defect, illness or disability exists which prevents the parent from performing any substantially gainful activity.'

"In determining physical and mental incapacity of a parent, when the incapacity is not obvious, it has been the policy of the Division of Welfare to designate

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certain examining doctors, clinics, hospitals or other medical institutions and to require of them written reports of their diagnosis.

"Section 9411 of the Missouri Revised Statutes, Annotated, provides in effect that if the claimant is not satisfied with the decision of the Division of Welfare he or she may appeal to the State Commission, and your office has ruled in an opinion dated May 20, 1947, 'that appeals granted under Section 9411 Revised Statutes of Missouri, 1939, should be made to the Director of the Department of Public Health and Welfare and that officer shall render judgment on said appeal in conformity with Section 9411, supra.' Said Section 9411 provides among other things as follows:

'The State Director of Public Health and Welfare upon receipt of such appeal shall give the applicant reasonable notice of, and opportunity for a fair and speedy hearing in the county of the residence of the applicant. Every applicant on appeal to the Director of Public Health and Welfare shall be entitled to be present, in person and by attorney, at the hearing, and shall be entitled to introduce into the record at the hearing any and all evidence, by witnesses or otherwise, pertinent to such applicant's eligibility as defined under the provision of Section 208.2(9407) and 9406 Revised Statutes, Missouri, 1939, and all such evidence shall be taken down, preserved and shall become a part of the applicant's record in said case, and upon the record so made the Director of Public Health and Welfare shall determine all questions presented by the appeal.' (Underlining ours)

"Section 9406 of the Missouri Statutes Annotated provides among other things as follows:

'In determining the eligibility of an applicant for public assistance under this law, it shall be the duty of the Commission (Director of Department) to consider and take into account all facts and circumstances surrounding the applicant, including his earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the applicant is not found to be in need, assistance shall be denied.'

(Parenthesis ours) (Underlining ours)

Hon. Samuel Marsh

"In determining eligibility by the Division of Welfare some applicants have objected to being examined by other than their family physicians, or physicians in their locality that they know, and we would appreciate receiving an opinion from you on the following questions:

*(1) Should the Division of Welfare accept any certification of medical or mental examination from a doctor or medical institution other than designated by the Division of Welfare?

*(2) If the Division of Welfare accepts reports from examining doctors other than designated by the Division of Welfare, what weight, if any, should the Division give their certification if such certification conflicts with the report submitted by the examining authority designated by the Division of Welfare?

"If your answer should be in the negative on Question (1) above, then when the claimant appeals from the Division of Welfare to the Director of the Department of Public Health and Welfare can the Director of the Department consider testimony or written statements of physicians, clinic or hospital authorities, other than those designated by the Division of Welfare, as to the physical or mental incapacity of the claimant under the law as set out in Section 9411, Section 9406 and Section 9408."

II.

Section 9408, R.S.A., Laws 1949, page _____ S.B. No. 68, provides as follows:

"Section 9408. Aid to dependent children shall be granted to a parent or other relative as herein specified for the benefit of any child who:

"(1) Is under the age of fourteen years; provided, however, that aid to dependent children shall be granted to children between the ages of fourteen and sixteen years, if the child with respect to which aid is granted is regularly attending some day school; and provided, further, that aid to dependent children shall be granted with respect to children under the age of six-

Hon. Samuel Marsh

teen years who otherwise qualify to receive such aid under the provisions of this Section, even though said child is not attending some day school, if such child is either physically or mentally incapable of attending school;

"(2) has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, step-sister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their own home and financial aid for such child is necessary to save him from neglect and to secure for him proper care in such home, provided, however, that when benefits are claimed on the basis of continued absence from the home of a parent and such absence is due to divorce or desertion and non-support of a child by a parent, the Division of Welfare shall, as a condition precedent to granting of benefits, require the claimant to initiate or prosecute legal proceeding against the defaulting parent to secure support for such child, or through its investigation determine that the claimant has in good faith informed and assisted the proper authorities and made all reasonable efforts to apprehend the parent and charge him with the support of said child; and provided, further, that when benefits are claimed on the basis of physical or mental incapacity of a parent, the probable duration of the physical or mental incapacity must be three months or more, and if the incapacity is not obvious, such incapacity shall be certified to by competent and appropriate authority designated by the Division of Welfare. Benefits may be granted and continued for this reason only while it is the judgment of the Division of Welfare that a physical or mental defect, illness or disability exists which prevents the parent from performing any substantially gainful activity:

"(3) has resided in the state for one year immediately preceding the application for benefits, or who was born within one year immediately preceding the application and whose mother has resided in the

Hon. Samuel Marsh

state for one year immediately preceding the birth."
(Underscoring ours)

Section 9406, R. S. Mo. 1939, as amended, Laws 1943, page 950, Laws 1949, page _____ S.S.H.B. No. 36 and Section 9411, R.S. Mo. 1939, were cited in your letter, and have been considered in regard to the above questions.

The court in the case of Hardy v. State Social Security Commission, 187 S.W. 2d. 520, l.c. 523, said:

"Old age assistance is a gratuity of the sovereign. It is a creature of the statute and not a right that a claimant may demand. The legislature can grant it or withhold it at will, or it may grant it with such reservations and under such conditions as it deems proper. Such restrictions, if reasonable, are binding upon the commission and upon the courts. Howlett v. State Social Security Commission, 347 Mo. 784, 149 S.W.2d. 806; Chapman v. State Social Security Commission, 347 Mo. 784, 149 S.W.2d. 806; Chapman v. State Social Security Commission, 235 Mo. App. 698, 147 S.W.2d. 157; Oliver v. State Social Security Commission, Mo. App., 184 S.W.2d. 774."

Aid for dependent children is also a gratuity of the state. The Legislature can grant it or withhold it at will, or may grant it with such reservations and under such conditions as it deems proper.

Prior to the amendment of section 9408, by the Legislature in 1949, the law did not provide for the examination of the parent by competent and appropriate authority designated by the Division of Welfare. The provision for the examination of parents claimed to be physically or mentally incapacitated was enacted by the Legislature to prevent parents, claimed to be so incapacitated, acquiring favorable medical statements from friendly physicians or from going from one physician to another until they find one who would certify or testify that they were incapacitated.

The court in the case of Galvin v. State Social Security Commission of Missouri, 129 S.W.2d. 1051, l.c. 1053, said:

"In construing the act we should consider the former state of the law, the new provision the evil sought to be removed, as well as the remedy provided, and so construe the law as to

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further the remedy and retard the evil. Such is a venerable rule of construction, none the less alive because old.' *Boll v. Condie-Bray Glass & Paint Co.*, 321 Mo. 92, 11 S.W.2d.48, 52."

This statement was quoted with approval by the Springfield Court of Appeals in the case of *Akers v. Division of Welfare*, and State Department of Public Health and Welfare, 224 S.W. 2d. 850.

In the *Akers* case cited above, the court said that the Commission (Division of Welfare) could only act upon competent evidence. The Legislature by the new enactment of Section 9408 has stated what shall be competent evidence as to the incapacity of a parent that is not obvious. The Legislature has said that the certificate by the physician, physicians or other competent and appropriate authority designated by the Division of Welfare shall be the evidence in regard to the physical or mental incapacity of a parent, who does not have an obvious infirmity. The Legislature further said that the benefits may be granted and continued for this reason only while it is the judgment of the Division of Welfare that a physical or mental difficulty, illness or disability exists which prevents the parent from performing any substantially gainful activity.

The maxim "*Expressio Unius Est Exclusio Alterius*" meaning the expression of one thing is the exclusion of another is discussed in 35 C.J.S., page 283, and 25 C.J., page 220, and numerous cases are cited therein. This rule has been held to mean that whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative namely, a thing shall not be done otherwise. The Supreme Court in the case of *Kroger Grocer and Baking Co. of City of St. Louis*, 106 S.W.2d. 435, 1.c. 439, said:

"* * *that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim *expressio unius est exclusio alterius*, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out';
* * *"

Therefore, the answer to your first question would be in the negative.

Since the answer to the first question is in the negative the answer to the second question is that the Division of Welfare should not give any weight to certificates by physicians who have not been

11. Samuel Marsh

designated to examine the parent who is alleged to be incapacitated.

In answer to your third question as to whether or not you should consider upon an appeal the testimony or written statements of physicians or others that were not designated by the Division of Welfare to examine the parent alleged to be incapacitated, we believe that there is no conflict between the requirements of Section 9408, as amended by the Laws of 1949, and the provisions of prior existing sections 9406 and 9411. But if there is a conflict between two statutes dealing with the same common subject matter, the statute which deals with it in a minute and particular way will prevail over one of a more general nature; and the statute which takes effect at the later date will also usually prevail (See the case of Vining v. Probst, 136 S.W.2d. 611, 239 Mo. App. 157.) Sec. 9408 as amended by the 1949 Legislature is a later amendment on this subject than Sections 9406 and 9411. Section 9408 definitely states who shall examine the parent claimed to be incapacitated.

"The Legislature is conclusively presumed to have intended what it plainly and unambiguously said in a statute, and if the statute so written needs alteration, it is for the Legislature, and not the courts, to make it--Crevisour v. Hendrix, 136 S.W.2d. 404, 234 Mo. App. 1012.

* * * * *

"Courts must confine themselves to carrying out the legislative intention as expressed in statutes, and any suggestion for change in the statutes should be addressed to the legislature.--In re Church, 204 S.W.2d. 126.

* * * * *

"The primary rule of statutory construction is to ascertain lawmakers' intent, from the words used if possible, and to put upon the statutory language, honestly and faithfully, its plain and rational meaning and to promote its object.

* * * * *

"In determining the meaning and intent of a statute, it is proper to consider purpose for which law was enacted, cause or necessity inducing enactment, and mischief sought to be remedied."

* * * * *

"To determine true meaning of language employed in a statute, the court must look at whole purpose of the statute, the law as it was before the enactment, and the change in the law intended to be made.

"Primary rule for construction of statutes is to ascertain lawmakers' intent from words used, if possible, giving language thereof, honestly and faithfully, its plain and rational meaning, and to promote its object.

* * * * *

"Where meaning of language is plain, it must be given effect, regardless of results or wisdom of law.--Sleyster v. Eugene Donzelot & Sone, 25 S.W. 2d. 147, 223 Mo. App. 1166." (Missouri Digest Vol. 26, Pocket Part, pages 70, 73, 74 and 75.)

The intention of the Legislature, in our opinion, is clear and unambiguous in requiring that the certificate of the authority designated by the Division of Welfare to examine the parent shall be the only certificate or evidence considered in regard to the physical and mental incapacity of a parent. If the applicant on appeal alleges and proves that the examining physician, physicians or other competent and appropriate authority designated by the Division of Welfare to examine the applicant was biased and prejudiced against the applicant, then you could order that the applicant be examined by other competent and appropriate authority to be designated by the Division of Welfare.

III. CONCLUSION

It is the opinion of this department that when the physical or mental incapacity of a parent is not obvious then the Division of Welfare shall not accept any statements or certificates from physicians, clinics or other medical authorities as to the physical or mental incapacity of such a parent unless such authorities have been designated by the Division of Welfare to examine the parent. The certificate of the examining authority that such a parent is incapacitated is the basis upon which aid to dependent children may be granted. The Director of the Department of Public Health and Welfare cannot grant benefits upon an appeal involving aid to dependent children of an alleged incapacitated parent, if the incapacity is not obvious, without a certificate of such incapacity by competent and appropriate authority designated by the Division of Welfare to examine said parent.

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

CRIMINAL LAW:

MISDEMEANOR CASES IN
MAGISTRATE COURTS:

DISQUALIFICATION OF JUDGE:

In absence of statutory authority magistrate judge may not disqualify himself and certify case to circuit court for trial. Prosecutor may dismiss misdemeanor case any time before defendant is put upon trial, and dismissal will be no bar to subsequent prosecution for same offense in same or any other court having jurisdiction of offense.

April 24, 1950

Mr. W. V. Mayse
Prosecuting Attorney
Harrison County
Bethany, Missouri



4/26/50

Dear Sir:

This is to acknowledge receipt of your letter requesting a legal opinion of this department, said letter reads as follows:

"I would like an opinion on the procedure necessary to avoid having to try a serious misdemeanor before our Magistrate, who is a layman and not a lawyer. Is there any Statute authorizing the Judge, himself, to disqualify himself and certify this case to the Circuit Court for trial?

"Also, I would like an opinion on whether a Prosecutor can dismiss a misdemeanor in Magistrate Court and refile it in Circuit Court, without prejudice.

"If possible, at all, I would very much appreciate this information before the 20th of April, if you could possibly get it to me by then, Thank you very much."

Sections 1 to 45, pages 750 to 761, inclusive, Laws of 1945, provide for the jurisdiction and procedure for magistrate courts in cases of misdemeanor.

Section 1 of the Act provides that magistrate courts shall have concurrent original jurisdiction with the circuit courts, co-extensive with their respective counties in the trial of all misdemeanors, and reads as follows:

"Magistrates shall have concurrent original jurisdiction with the circuit court, co-extensive with their respective counties in all cases of misdemeanor, except in cities

Mr. W. V. Mayse

having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law."

In view of this section, a prosecution for a misdemeanor might be instituted in either a magistrate court or in the circuit court of the county in which the offense was alleged to have been committed. From the facts given in your letter it appears that the misdemeanor prosecution was instituted before the magistrate in your county who is not a lawyer and that you would like to know of any statute which would authorize the court to disqualify himself and certify the case to circuit court for trial.

It appears that Sections 1 to 45, Laws of Missouri, 1945, is complete and all inclusive as to the jurisdiction and procedure of misdemeanor cases in magistrate courts in the various counties of the state except in cities having courts which exercise exclusive jurisdiction in criminal cases or as may be otherwise provided by law.

Upon a careful review of the entire Act we are unable to find provision of this act or of the general statutes providing that a magistrate judge may disqualify himself upon his own motion and to certify a misdemeanor case pending before him to circuit court for trial. Therefore our answer to your first inquiry is that since there are no statutory provisions authorizing such action the magistrate does not have this authority.

Section 29, Laws of Missouri, 1945, p. 757, provides what procedure shall govern in the trial of misdemeanors in magistrate courts, and reads as follows:

"All proceedings upon the trial of misdemeanors before magistrate shall be governed by the practice in criminal cases in circuit courts, so far as the same may be applicable, and in respect to which no provision is made by statute; provided, no instructions or declarations of law shall be given by the magistrate."

It has long been the law in Missouri that a prosecutor may enter a nolle prosequi in a criminal case pending in circuit court at any stage of the proceeding before the defendant has actually been put to trial under a valid indictment or information.

This form of dismissal refers to the dismissal of criminal cases and in effect is a record entry in the case that the prosecutor or plaintiff declares that he will proceed no further. If the dismissal is taken before the defendant has been put upon trial

for the criminal offense charged, and before jeopardy attaches, such dismissal of the case will have the same effect as though the case had not been filed or an indictment had never been returned against the defendant.

While such dismissals in practice are not taken "without prejudice" but if properly and timely taken will not prevent him from being charged with the same offense by a subsequent indictment or information. Since the prosecuting attorney represents the interests of the public and is familiar with the facts, and knows whether a case should be prosecuted or not, the dismissal is allowed by the court upon the prosecutor's motion almost as a matter of course.

In the case of *Ex parte Donaldson*, 44 Missouri, in passing upon the right of the prosecutor to enter a nolle prosequi the court said as l.c. 154:

"* * * Then, before any further steps were taken by the court, the circuit attorney entered a nolle prosequi. This he had a right to do, with assent of the court, at any time before the prisoner was put upon his trial. The prisoner never had any judgment of discharge entered in his favor; he was never put in jeopardy, and we can see nothing to prevent his being further held amenable."

Also see *State ex rel. vs. Primm*, 61 Mo. 166; *State vs. Taylor*, 171 Mo. 465.

In the case of *State vs. Goddard*, 162 Mo. 198, it was held that a dismissal or quashing of a first indictment is no bar to a second prosecution on a second indictment. Where defendant was indicted and was granted a change of venue to another county the entrance of a nolle prosequi there was no bar to a further indictment and prosecution in the county where the crime was committed.

In view of the provisions of Section 29, Laws of Missouri, 1945, the proceedings upon the trial of misdemeanors before magistrate courts shall be governed by the practice in criminal cases before the circuit court and since it has long been the law in Missouri that a prosecutor has for proper reasons the right to enter a nolle prosequi in any criminal case in circuit court, we submit that the prosecutor in a misdemeanor case pending before a magistrate has the same right to dismiss any such criminal proceeding for like reasons, and that if the nolle prosequi is taken

before the defendant is put upon trial for the offense charged and before he had been put in jeopardy, that the dismissal is no bar to a subsequent prosecution of the defendant on the same charge in the same or any other court having jurisdiction of the criminal offense.

CONCLUSION

It is therefore the opinion of this department that a magistrate before whom a criminal prosecution in a misdemeanor case is pending does not have the power to disqualify himself upon his own motion and to certify said case to the circuit court of his county for trial, there being no provisions authorizing such action by the magistrate either under the provisions of Sections 1 to 45, pages 750 to 761, inclusive, Laws of Missouri, 1945, providing for the jurisdiction and procedure of magistrate courts in cases of misdemeanors or under the provisions of the general statutes of the state.

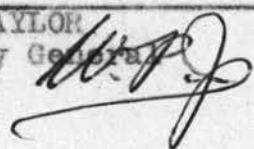
It is the further opinion of this department that a prosecuting attorney may by leave of court enter a nolle prosequi or a dismissal in a misdemeanor case pending before a magistrate court in his county at any time before the defendant has been put upon trial or placed in jeopardy of an offense charged in the indictment or information in said case. That such dismissal will release the defendant from the indictment or information but will not prevent the defendant from being subsequently prosecuted on the same charge in the same or any other court in the county having jurisdiction of such criminal prosecution.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



PNC:nm

CRIMINAL LAW - INFORMATION: False pretenses not punishable
when based on promise to do an
FALSE PRETENSES: act in the future.

May 6, 1950

5/11/50

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

Your letter dated May 4, 1950, requesting an official opinion of this department has been received. The letter is quite lengthy so that we quote only parts of the same as follows:

"Herein is an amended information that was quashed by the local circuit court because it did not state enough facts to constitute a crime. * * *"

* * * * *

"The Court in its comment indicated that too many facts were pleading including future facts that would not make out the crime of false pretenses. He indicated that the facts that this woman alleged made love to this old man, was a far fetched possibility and was of such fragmentary guess work that the old man had no right or business to rely upon the same."

Attached to your request is a copy of an amended Information filed by you in the Circuit Court of Morgan County in your official capacity, in which one Viola Foster is named as defendant. It may be conducive to better understanding if the Information is discussed by sections.

1. It is first charged that defendant, by false and fraudulent pretense, obtained in cash from one Jess Crow \$935.00. Then it is alleged that by the same means defendant obtained from Crow \$100.00 and also \$160.00. While

May 6, 1950

you do not state, we assume these two amounts were obtained at the same time and under the same circumstances. \$100.00 was advanced by Crow, as he understood, as an attorney fee through and by which defendant would obtain a divorce from her then husband. That proceeding, of course, would be consummated thereafter. \$160.00 of the amount was "to have the house locked up so Doc Foster could not get any of the furniture." Obviously this amount of money was procured from Crow with the knowledge that the act to be done was also to be performed in the future. It is not stated in the Information that the defendant had promised Crow, if and when she later on procured a divorce from her then husband, that she would marry him. If such an agreement had been made it would have been void under the law.

The conclusion reached by the court, as indicated in your letter, on the affair between these two people, is quite understandable. From this distance it looks like Crow was a more or less willing victim to the wiles of a designing adventuress, or that he gambled on a joint questionable venture and lost his money. In either circumstance the crime sought to be charged in the Information was not committed.

2. The Information further charges that "in a few days," which we assume was a few days later than the \$260.00 was obtained, defendant secured an additional \$675.00 from Crow on the alleged statement and pretext that her lawyer told her to get enough money from Crow to pay off a mortgage on a motor car. (Whose motor car is not stated.) And, further, to get from Crow sufficient money to pay defendant's expenses to Kansas City for the purpose of paying off the above mortgage, all of which acts were to be performed in the future. And, it is stated that defendant would have \$3500.00 in cash in a few days, but it is not stated that Crow was to have any part of this money. It is further alleged that defendant agreed to give Crow a good bankable note for the \$675.00. This also was to be done in the future. There was no representation by defendant of any past or present fact in which Crow had any interest. He furnished the money, according to the Information, because he was thereafter to receive a bankable note for the amount. Then it is alleged that the instrument given Crow as and for the bankable note was a worthless scrap of paper. The most that can be said about all this is that defendant deceived Crow, not as to a present or past existing fact, but as to something she would do in the future.

3. The allegation as to the check for \$200.00 given by Crow to defendant on which payment was stopped at the bank,

Honorable G. Logan Marr

May 6, 1950

would not properly be a part of any Information, because the defendant received no money or property by reason of the check.

4. On the point involved in this case, in State v. Hollbrook, 289 S.W. 560, it is stated l.c. 561:

"The representation mentioned in said instruction and quoted above was a representation of something to be done by appellant and Steiner in the future. It was nothing more than a mere promise. It was not a representation of an existing fact, and in itself was not a sufficient false representation upon which to base a conviction of obtaining money under false pretenses. 25 C.J. 593; State v. Petty, 119 Mo. 425. 24 S.W. 1010; State v. Cameron, 117 Mo. loc. cit. 648, 23 S.W. 767; State v. Young, 266 Mo. loc. cit. 733, 183 S.W. 305; State v. Eudaly (Mo. Sup.) 188 S.W. 110."

To the same effect see State v. Houchins, 46 S.W. 2d 891, and State v. Wren, 62 S.W. 2d 853.

The cases cited by you in your letter, State v. Starr, 148 S.W. 862, 244 Mo. 161, and State v. Mandell, 183 S.W. 2d 59, 353 Mo. 502, do not support the Information because the facts in both cases show false pretense and representation as to facts existing at the time the representations were made.

CONCLUSION

It is the opinion of this department that on the facts as set out in the amended Information attached to your letter, an Information cannot be drawn that will charge the defendant with the offense of obtaining money by false and fraudulent pretenses.

Respectfully submitted,

Approved:

GILBERT LAMB
Assistant Attorney General

J. E. TAYLOR
Attorney General
GL:lrt

#230
HEALTH, Dept. of: Approval of contract for construction of five (5) staff residences at State Hospital No. 3, Nevada, Missouri.

May 8, 1950



Honorable Samuel Marsh
Director
Department of Public Health
and Welfare
Jefferson City, Missouri

Dear Mr. Marsh:

In reply to your request we have examined the contract for the construction of five (5) staff residences at State Hospital No. 3, Nevada, Missouri, between the State of Missouri and J. G. Welborn of Nevada, Missouri.

We find the contract to be in such form as to bind the parties thereto. It is assumed that there is a sufficient amount of money in the appropriation to cover the contract sum as agreed upon.

Yours very truly,

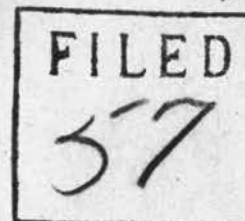
JOHN R. BATY
Assistant Attorney General

JRB:ir
enc:

HEALTH, Dept. of: Architectural contract in connection with
alteration of recreational building at
St. Louis State Hospital, St. Louis, Mo.

May 9, 1950

5/9/50



Honorable Samuel Marsh
Director
Department of Public Health and Welfare
Jefferson City, Missouri

Dear Mr. Marsh:

In reply to your request we have examined a copy of the architectural contract between the State of Missouri and Mr. Charles M. Zacha, Jr. for services in connection with the alteration of the recreational building at St. Louis State Hospital, St. Louis, Missouri.

We find the contract to be in such form as to bind the parties thereto. However, in order to express the intention of the parties it will be necessary to add the words "alteration of the recreational building" in the blank space immediately preceding clause I on page 1.

In clause IX, page 3, headed "Supervision" the second sentence of the clause should end with the word "completed". The rest of the written matter in the said clause is not applicable to this contract. We have lined-out the words which are inapplicable, and the parties affixing their signatures to this document should place their initials in the margin alongside the deleted material.

Yours very truly,

JOHN R. BATY
Assistant Attorney General

JRB:lr

CRIMINAL LAW:
ACCESSORY BEFORE
THE FACT:

One who procures others to commit a crime is guilty as a principal although he was not bodily present at the time and place where the crime was committed.

May 10, 1950

5/11/50



Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This department is in receipt of your recent request for an official opinion.

The fact situation which you present appears to be that one O. H. had some type of ownership in an eighty acre tract of land in Morgan County; that at a distance of from $\frac{1}{2}$ to $\frac{1}{4}$ mile south of this tract was land owned jointly by two other persons; that upon this latter tract there was certain oak timber; that O. H. hired timber cutters to cut oak timber, allegedly upon land owned by him, and directed them, by means of various locations and descriptions, to go and cut oak timber upon this latter tract of land which he, O.H., did not own; that the cutters did so, cutting, hauling away, and selling timber to the value of \$500, of which sum they gave O. H. one-half; that the cutters did not know that the land from which they cut the timber was not owned by O. H.

Your question is whether O. H. is guilty of a crime; if so, of what crime; and if guilty how he should be charged?

It is the opinion of this department that O. H. is guilty of a crime, to-wit, larceny of timber, and that he should be charged under Section 4468 Mo. R. S. A. 1939. This section reads:

"Every person who shall sever from the soil of another any produce, standing or growing thereon, or shall sever from any building, bridge or causeway, or from any gate, fence or other railing or enclosure, or any part thereof, any materials of which the same is composed, and shall take and convert the

Mr. G. Logan Marr

same to his own use with intent to steal the same, or who shall steal, take and carry away any timber, rails or wood, standing, being or growing on the land of another, or who shall steal, take and carry away any coal or mineral ore or stone belonging to and being in or on the land of another, or who shall steal, take and carry away any roots, plants, melons, garden vegetables, grain, corn, flax, hemp, or any cultivated grass or fruit, in which he has no right or interest, standing, lying or being on the land of another, shall be deemed guilty of larceny in the same manner and in the same degree, according to the value of the property, article or thing so taken, as if the same had been severed at some different and previous time."

It is true that O. H. did not personally go upon this tract of land and cut or assist in cutting this timber, nor is it necessary that he do so in order to be guilty under Section 4468 where, as in the instant case, he procured others to do this. Section 4839 Mo. R. S. A. 1939, states:

"Every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory to any murder or other felony before the fact, shall, upon conviction, be adjudged guilty of the offense in the same degree, and may be charged, tried, convicted and punished in the same manner, as the principal in the first degree."

In the case of State v. Mintz, 189 Mo. 268, l. c. 293 and 294, the court stated:

"This brings us to the only remaining proposition presented to our consideration, that is, the refusal of the court to instruct the jury that if 'they believe and find from the evidence that the witness Rector had no intention to take, steal and carry away the property when he obtained it, then he was not guilty of larceny, nor was the defendant guilty of larceny.'

Mr. G. Logan Marr

"Upon the facts developed at the trial of this case we have reached the conclusion that there was no error in the refusal of this request. The testimony as introduced by the State is undisputed that the witness Rector was the instrument selected by the defendant to accomplish his fraudulent and felonious intent of stealing the property as charged in the information and permanently depriving the owner of it. He furnished the wagon; directed Rector how to proceed in order to obtain this property and upon the testimony, as disclosed by the record, the felonious intent and design entertained by the defendant in this case is made too clear for discussion. Whatever was done by Rector must be treated as the act of this defendant, and even though Rector's mind was inactive and he was ignorant of the purposes of his act, if defendant Mintz directed the act to be done, and had the felonious intent of stealing the property and converting it to his own use, through the act of his instrument, Rector, then the act of Rector and the intention of the defendant Mintz should be brought together, and the commission of the act must be treated as though it was executed by defendant, who directed it. In other words, if defendant Mintz entertained the felonious intent and design of stealing this property and directed Rector to do such acts as would result in obtaining the property, without informing Rector as to his intent, and by reason of the commission of the act by Rector the property is obtained and converted by the defendant Mintz, to his own use, we are unwilling to say that this would not constitute larceny on the part of the defendant Mintz. If Rector had no design or intent to steal the property obtained by him, at the time of taking such property, and he was simply, as claimed by appellant carrying out the purposes of the defendant Mintz, without any information as to what Mintz's purposes were, then there is no difference in principle in the use of Rector by the defendant as an instrument to remove the property from the possession of the owner, and in using any inanimate instrument in reaching out, such as tongs, pinchers or other instruments to remove the property sought to be stolen from its location. The defendant

Mr. G. Logan Marr

Mintz having directed Rector in the commission of the act of taking the property, it must be held that the intent of defendant Mintz accompanied Rector in the commission of such act."

In the case of State v. Kramer, 226 S. W. 643, 1. c. 645, the defendant was a liquor dealer living in St. Louis, Missouri. At that time the City of Kirksville, located in Adair County, Missouri, was a "dry" city, having elected to be so under the local option law. The defendant, from this office in St. Louis, wrote to numerous residents of Kirksville, offering to sell them intoxicating liquor, stating therein that he had obtained an order of the court compelling the American Railway Express Company to accept shipments of intoxicating liquor and to deliver them in dry territory, which statement was untrue. A number of the persons so solicited ordered liquor from the defendant by letter, had their order verified by defendant, sent the purchase price to defendant in St. Louis and received the liquor which was delivered to them by the American Railway Express Company in Kirksville. Subsequently defendant was tried in Adair County and was convicted of the violation of the local option law in Adair County. During this entire transaction the defendant was 201 miles away from Kirksville. The Kansas City Court of Appeals, in affirming the conviction of the defendant, stated:

"One can commit an offense and complete it through an agent; and the actual bodily presence of the defendant in the venue of the commission thereof is unnecessary. 16 C. J. 124; State v. Mispagel, 207 Mo. 557, 577, 106 S. W. 513. The record does not disclose that any court issued an order compelling the express company to deliver liquor in dry territory. Pasted on each of the cartons in which the liquor was sent was printed matter, purporting to be a copy of the concluding portion of a court order to that effect, and it seems that one of these was introduced in evidence, but there is nothing to show that any court issued the same. However, even if the defendant did obtain such an order compelling the express company to deliver liquor in dry territory, this would be no defense for the defendant, whatever it might avail the express company, if it were being prosecuted.

Mr. G. Logan Marr

By the very terms of this purported order, the carrier became the agent of the shipper to transport and deliver the liquor. Hence the defendant made the delivery in Kirksville, and the place of the sale was made there where it was completed by the delivery. Dick Bros. v. Quincy, etc., R. Co., 199 Mo. App. 668, 204 S.W. 584."

In the above case the American Railway Express Company was the innocent agent of the defendant, as were the woodcutters in the instant case; and, as here, the defendant was never personally present at the place where the crime was committed.

In the case of State v. Hayes, 262 S.W. 1034, 1. c. 1037, the court stated:

"The appellant is guilty, if at all, because he was an accessory before the fact. An accessory before the fact is one who is not present, either actively or constructively, at the place of the commission of the crime, but who counseled, procured, or commended it. 29 C.J. 1066. That is alleged, and the evidence tends to prove the appellant's participation in the offense in that way.* * *"

In the case of State v. Parker, 24 S.W. (2d) 1023, 1. c. 1026, the court stated:

"The proof did not show that the defendant broke into the Kroger store, but that he was accessory before the fact; that he hired other men to do the breaking in and to steal the sugar. Appellant complains that the defendant was not charged as an accessory but as a principal, and the proof did not sustain the charge. Section 3687, Revised Statutes 1919, provides that an accessory before the fact in the commission of a felony 'may be charged, tried, convicted and punished in the same manner, as the principal in the first degree.' This statute has been construed to cover just such cases as this. State v. Rennison, 306 Mo. loc. cit. 484, 267 S.W. 850; State v. Millsap, 310 Mo. loc. cit. 513, 514, 276 S.W. 625."

Mr. G. Logan Marr

In the case of State v. Layton, 202 S.W. (2d) 898, 1. c. 899, the court stated:

"The foregoing outline of the facts is sufficient to demonstrate that there is no merit in contention that the court should have directed a verdict of not guilty. 'Uttering a forged instrument may be effected by means of an agent * * *. One who procures another to utter a forged instrument is as culpable as if he had perpetrated the act himself.' 37 C. J. S., Forgery, Sec. 42 sub. sec. b. pp. 63, 64. While defendant was not present when the check was cashed, he consented to, aided in, and procured it to be done, and hence punishable as a principal. Sec. 4839, R. S. '39 and Mo. R. S. A."

Therefore, it is our opinion, as we stated above, that O. H. is guilty of being an accessory before the fact of larceny of timber and should be charged therewith under Section 4468.

CONCLUSION

It is the conclusion of this department that one who procures others to commit a crime is guilty as a principal although he was not bodily present at the time and place where the crime was committed, and although he employs innocent agents; and that, under the facts presented by you, O. H. is guilty of larceny of timber and should be charged under Section 4468 R. S. Mo. 1939.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HPW:hr

NOTICE:
NEWSPAPERS:
PUBLIC BUILDINGS:

Statutory requirement of ten days' notice
complied with by insertion in two conse-
cutive issues of a weekly paper provided
the first insertion is at least ten days
before the award of a contract.

May 16, 1950

5/17/50

Honorable Samuel Marsh
Director
Department of Public Health and
Welfare
Jefferson City, Missouri



Dear Mr. Marsh:

This is in reply to your request for an of-
ficial opinion which reads:

"We are contemplating placing adver-
tisements for bids for a small con-
tract.

"It has been our practice on this
type of contract to place an adver-
tisement for ten consecutive issues
in a daily paper in the county where
the work is to be done.

"According to our information there is
no daily paper in the county where the
work is to be performed. There are a
number of weekly papers. Would it be
permissible for us to place this ad-
vertisement in one of the weekly papers
for a period of two weeks. Would this
amount of advertising meet the require-
ments required by law."

The statutory requirement for advertisement
for bids is found in Section 14939, R.S. Mo. 1939, and
is as follows:

"No contract shall be made by an officer
of this state or any board or organization
existing under the laws of this state or

Honorable Samuel Marsh

under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing 500,000 inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

(Underscoring ours.)

From your opinion request we assume that the contemplated work does not exceed the sum of \$35,000.00.

The Supreme Court of Missouri considered the question of publication of notices in the early case of The German Bank vs. Stumpf, 73 Mo. 311, where at l.c. 314, the following was declared to be the law in relation thereto:

"In regard to the notice, we are of opinion that the omission to publish it on the three days named, does not render the sale void. But for the statement in the affidavit read, that the notice was published on Monday, October 2nd, which may be a mistake, we would

Honorable Samuel Marsh.

suppose the St. Louis Journal was one of those daily papers, which, in order to avoid the necessity for laboring on Sunday, is not published on Monday. It is unnecessary, however, to make any conjectures upon the subject. When thirty days' notice is required, thirty days should, of course, intervene between the first publication and the day of sale, and although it may be customary and prudent to continue the notice in every issue of the paper from its first insertion to the day of sale, yet it has been expressly decided that 'thirty days' notice in a daily paper' does not mean thirty days' daily notice in such paper. White v. Malcolm, 15 Mo. 543. Vide also, Johnson v. Dorsey, 7 Gill 286; Leffler v. Armstrong, 4 Iowa 482. We think, however, that where the notice has not appeared in every issue of the paper from its first insertion to the day of sale, and the omission to make continuous publication thereof is of such a character, or is attended by such circumstances as to mislead the public and work injury to the party whose property is sold, the sale may be set aside. Stine v. Wilkson, 10 Mo. 96. To avoid such a contingency, therefore, in all cases where notice is required to be published in a daily paper, the notice should be published in every issue of such paper from the first insertion up to and including the day of sale. * * * ."

Subsequently, the Supreme Court of Missouri again considered the legality of a statutory notice in the case of City of Brunswick vs. Benecke, 233 S.W. 169, and at l.c. 171, the Court said:

"In State v. Brown, 130 Mo. App. 214, 109 S.W. 99, Bland, P.J. (Goode and Norton, JJ., concurring), said:

"The Dobbins case seems to assume that the notice ceases to be published the day

Honorable Samuel Marsh.

after the paper leaves the press; that it does not continue to be published from one issue of the paper to the next succeeding one. If this were true, a notice published in a weekly newspaper 4 times would only give 4 days' notice, and, to comply with the requirements of the statute, it would be necessary to publish the notice for 28 days in a daily paper, or for 28 weeks in a weekly newspaper. The notice, as such, when published in a weekly, does not cease to impart notice the day after the paper leaves the press, but continues, within the meaning of the statute, to be published until the issuance of the next current number of the paper, or for 7 days. The last insertion should be held to continue for the same length of time to impart notice of the election.'

"We approve this enunciation, and think the rule applicable to the question under consideration, and in harmony with all other rulings of this court. * * * ."

Section 14939, supra, requires that public bids be solicited "for ten days in one paper in the county in which the work is located." Under the rule set out in the City of Brunswick case, this requirement is satisfied by advertising in two consecutive issues of a weekly paper, providing the first insertion is at least ten days before the award of the contract.

CONCLUSION.

Therefore, it is the opinion of this Department that the statutory requirement of ten days' solicitation for bids is complied with by advertising in two consecutive issues of a weekly paper, providing that the first insertion is at least ten days before the award of a contract.

Respectfully submitted,

APPROVED:

JOHN R. BATY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JRB:ir

HEALTH, Dept. of: Legality of contract for architectural services
in construction of dormitory at Federal Soldiers'
Home at St. James, Missouri.

May 26, 1950



Honorable Samuel Marsh, Director
Department of Public Health & Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Marsh:

This is in reply to your request for our opinion as to the legality of a contract for architectural services between the Department of Public Health and Welfare of the State of Missouri and Gentry and Voskamp, Architects, of Kansas City, Missouri, in connection with the construction of a dormitory building for male veterans at the Federal Soldiers Home at St. James, Missouri.

We find the contract to be in such form as to bind the parties thereto, but suggest the following:

(1) On page 2 under Clause IV the last word of the first line of the second paragraph should read "bending" instead of "bonding." This correction may be made on the contract if initialed by the parties.

(2) On page 3 under Clause IX it is noted that the second paragraph relating to the employment of a clerk-of-the-works is lined out indicating that it is not applicable to this contract. Again we suggest that the initials of the parties be placed beside the lined out material.

(3) On page 4 under Clause X the blank space which should contain the budget amount for the project has not been filled in. This should be done before the contract is signed.

After the above matters have been corrected, we believe that the contract will be in sufficient form.

Yours very truly,

JOHN R. BATY
Assistant Attorney General

JRB:VLM

PUBLIC HEALTH & WELFARE, Dept. of: Approval of proposed contract for repairs of roofs on Criminal Building at State Hospital #1, Fulton, Missouri.

#289

June 19, 1950



Honorable Samuel Marsh
Director
Department of Public Health
and Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Marsh:

We have examined the contract with Biebel Brothers, Inc., 241 Lebanon Street, St. Louis, Missouri, for repairs of roofs on the Criminal Building at State Hospital #1, Fulton, Missouri.

We find the contract to be in such form as to bind the parties. It is assumed that there is a sufficient amount of money to cover the contract sum as agreed upon.

It is further assumed that the applicable provisions of law relating to the letting of contracts have been followed.

Yours very truly,

JOHN R. BATY
Assistant Attorney General

JRB:ir
attch:

#288
PUBLIC HEALTH & WELFARE, Dept. of: Approval of proposed contract for repairs to roofs on property at State Hospital #2 St. Joseph, Missouri.

June 19, 1950
6/19/50

Honorable Samuel Marsh
Director
Department of Public Health
and Welfare
State Office Building
Jefferson City, Missouri



Dear Mr. Marsh:

We have examined the contract with the Koch-Schroeder Construction Company of St. Joseph, Missouri, for repairs to roofs on property at the State Hospital #2, St. Joseph, Missouri, provided for in Specifications dated April 26, 1950.

We find the contract to be in such form as to bind the parties. It is assumed that there is a sufficient amount of money in the appropriation to cover the contract sum as agreed upon.

It is further assumed that all requirements of law in the letting of contracts have been followed.

Yours very truly,

JOHN R. BATY
Assistant Attorney General

JRB:ir
attch:

LOTTERY: Scheme whereby tickets are given by merchants with each purchase and drawing held with automobile as prize constitutes lottery even though some free tickets are distributed.

August 9, 1950

FILED 57

Honorable Edgar Mayfield
Prosecuting Attorney
Laclede County
Lebanon, Missouri



Dear Sir;

This department is in receipt of your request for an official opinion as to whether a certain business scheme and enterprise is a lottery in violation of the laws of this state.

From the facts submitted in your letter the enterprise is to be conducted in the following manner:

Various merchants will have printed a supply of coupons upon which there is a space for the person receiving the coupons to write his or her name and address. Anyone making a purchase at the various places of business of the merchants involved will receive coupons, the number thereof depending upon the amount of the purchase. Also, coupons will be given free to any person who comes into the store and asks for the same. However, only one or two coupons are given to a person who requests them but does not make a purchase. A person buying merchandise from one of the merchants receives a larger number of coupons. The person receiving the coupon writes his or her name and address thereon and the coupon is then deposited in a box in a theater lobby. At the end of a specified period a drawing is held at the theater and the person whose name appears on the coupon drawn receives an automobile. The person does not have to be in the theater at the time the drawing is held in order to win.

Article III, Section 39 of the Constitution of Missouri, 1945, provides:

"The general assembly shall not have power:

* * * * *

"To authorize lotteries or gift enterprises for any purpose, and shall enact laws to

Honorable Edgar Mayfield

prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery;

* * * * *

Section 4704, R.S. Mo. 1939, provides that if any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery, he shall be deemed guilty of a felony.

It is well settled in this state that the essential elements of a lottery are prize, chance and consideration. State v. Emerson, 318 Mo. 633, 1 S.W. (2d) 109; State ex inf. McKittrick v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S.W. (2d) 705. We believe it is apparent in the scheme described above that the elements of prize and chance are present. However, the question arises whether the element of consideration is present, in view of the fact that persons may receive the coupons or chances free of charge and without necessity of purchasing any merchandise from the merchants sponsoring the enterprise.

This question was considered by our Supreme Court in the case of State v. McEwan, 343 Mo. 213, 120 S.W. (2d) 1098. In that case, which considered the legality of "bank night," the defendant contended that the scheme was not a lottery because a person could register in the lobby of the theater and did not have to be present inside the theater at the time the drawing was held in order to be eligible for the prize. At l.c. 1101 the court said:

"On the otherhand, a game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances. * * *"

In disposing of this contention the court tersely said, l.c. 1100:

" * * * The so-called free number feature of the scheme is only the goat's skin upon the hands of Jacob. It is there in an attempt to fool the law."

Therefore, we believe that even though coupons are passed out free of charge to persons asking for the same, still this does not take away the inherent evil of the scheme. The persons

Honorable Edgar Mayfield

who purchased merchandise received a larger number of coupons, and as to those persons the element of consideration is present. Consequently, we believe that the enterprise in question constitutes a lottery and violates the Constitution and laws of this state.

CONCLUSION

It is therefore the opinion of this department that a scheme whereby coupons are distributed by merchants to their customers with each purchase, which coupons are placed in a box and after a specified period of time one coupon is drawn from the box and the person whose name appears upon said coupon receives an automobile, constitutes a lottery. The fact that coupons are given free to persons requesting the same from the merchants does not make the scheme any less a lottery.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

/s/ C.B.B.

J. E. TAYLOR

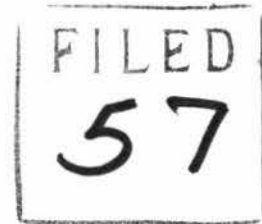
Attorney General

DEPARTMENT OF PUBLIC
HEALTH AND WELFARE:
LEASE OF FARM LAND
OF CONFEDERATE HOME:

Department of Public Health and Welfare and the Division of Welfare does not have authority to lease any of the land constituting a part of the Confederate Home near Higginsville, Missouri.

October 9, 1950

Honorable Samuel Marsh
Director, Department of Public
Health and Welfare
State Office Building
Jefferson City, Missouri



Dear Mr. Marsh:

I.

This will acknowledge receipt of your letter of August 28, 1950, requesting an opinion as to a proposed lease to be entered into by your department on behalf of the Confederate Home at Higginsville, Missouri, and also your letter of September 11, 1950, in which you submitted a copy of the proposed lease and additional information.

In this last letter you state:

"The Division of Welfare, which division has direct supervision over the operation of the Confederate Home at Higginsville, would like to lease the farm to a tenant farmer on a share basis, as they have very few inmates there at the present time, and they believe it would be more economical to rent the farm than to operate it with our own personnel.

"We would like your opinion as to whether I, as the incumbent Director of the Department of Public Health and Welfare, and thereby as owner of this farm as trustee for the State, have the power to execute this lease."

(The original copy of the lease is returned to you herewith.)

Honorable Samuel Marsh

II.

The Legislature in 1945 provided as follows:

"The department of public health and welfare through and on behalf of the division of welfare shall have the power; to sue and be sued; to have succession in its corporate name; to make contracts and carry out the duties imposed upon it by this or any other law; to administer, disburse, dispose of and account for funds, commodities, equipment, supplies or services, and any kind of property given, granted, loaned, advanced to or appropriated by the state of Missouri for any of the purposes herein; to administer oaths, issue subpoenas for witnesses, examine such witnesses under oath, and make and keep a record of same.
* * * (See Sec. 33, Laws Mo. 1945, page 954.)

The Supreme Court of Missouri in the case of State ex rel. St. Louis vs. Evans, 139 S.W.2d 967, 246 Mo. 209, held that a lease is a conveyance or grant of an estate in real property for a limited term with conditions attached and said:

"'A lease is generally regarded as a conveyance or grant of an estate in real property for a limited term with conditions attached, and in this connection has been defined as a conveyance to a person for life or years, or at will, in consideration of a return of rent or other recompense, and as a conveyance of any lands or tenements, usually in consideration of rent or other annual recompense, made for life, for years, or at will, but always for a less time than the lessor has in the premises.' 35 C.J., Sec. 381, page 1140.

"Respondents admit that this is a correct definition of a lease, because in their brief they define a lease as follows: 'A contract by which one conveys lands, tenements or hereditaments for life, for a term of years or at will, or for any less interest than that of the lessor, usually for a specified rent or compensation.'"

46 C.J. Sec. 287, page 1032, lays down the following principle and reads:

Honorable Samuel Marsh

"While officers are presumed to have acted within their authority, statutes delegating powers to public officers must be strictly construed, and all persons dealing with public officers must inform themselves as to their authority, and acts which are within the apparent, but in excess of the actual, authority of officers will not bind the government which they represent, unless ratified by it."

The Supreme Court of Indiana in the case of McCaslin et al. v. State, 99 Ind. 428, 1.c. 440, states the well established rule of law that a public officer can only deal with property of the state when so authorized by law. The court said:

"* * * A state officer can only deal or contract in relation to the property of the State, when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so authorized, is void as against the State. * * *"

The Supreme Court of California in the case of McNeil v. Kingsbury, 190 Cal. 406, 213 P. 50, held that where lands are devoted to some special public use by legislative authority, they are not included in general statutes concerning disposal of public lands.

50 C.J. Sec. 583, page 1138, provides:

"The powers and duties of the various land officers and agents of the state, the finality of their decisions and other considerations, are generally fixed by constitutional or statutory provisions, explicitly or implicitly. Officers appointed to sell state lands can dispose of such lands only as are contemplated by the statute providing for such sale. * * *"

59 C.J. Sec. 280, page 167, states the general rule with respect to disposition of state property and reads in part:

"The power to dispose of state property is vested in the legislature which may make provisions therefor by statute, and the statutory provisions must be complied with or the sale will be void."

Honorable Samuel Marsh

Authority for the above statement is found in the case of State of Wisconsin v. Torinus, 26 Minn. 1, 49 N.W. 259, 1.c. 260, wherein the court said:

"The proprietary rights of a state are as absolute and unqualified as those of an individual. It may, in the absence of any self-imposed restrictions in its constitution, sell and dispose of its property upon its own terms and conditions, for cash or upon credit; and it may also take, hold, and enforce notes and obligations received from the purchasers of its property, the same as individuals can. But as the legislative department is the only one that represents the state in respect to such rights, it alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose."

The above case is cited with approval in the case of Bjurke v. Arens, 281 N.W. (Minn.) 865, 1.c. 869:

"In disposing of such lands the state exercises the same proprietary rights as an individual and may sell and dispose of its property upon such terms, for cash or upon credit, as shall be determined by statute. State of Wisconsin v. Torinus, 26 Minn. 1, 49 N.W. 259; 37 Am. Rep. 395."

And again in the case of Henderson v. City of Shreveport, 160 La. 360, 107 So. 139 1.c. 142, wherein the court said:

"* * *it follows that public things cannot be alienated without the express consent of the sovereign, and hence, of that branch of the government to which has been given the supreme lawmaking power."

In the foregoing cases, it is evident that in order to dispose of state property a legislative act is necessary.

Section 33 of Laws of Missouri, 1945, page 954, quoted at the beginning of this opinion does not give the Department of Public Health and Welfare or the Division of Welfare specific authority to sell or dispose of real estate. We believe that the authority given in that section relates to personal property such as funds, commodities, equipment, supplies and other similar property.

Honorable Samuel Marsh

We believe that the Legislature would have to enact legislation giving your department specific authority to lease the land before a lease would be valid and binding upon all the parties.

III.

CONCLUSION

It is the opinion of this department that the Department of Public Health and Welfare and the Division of Welfare does not have authority to lease any of the land constituting a part of the Confederate Home near Higginsville, Missouri.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION:
COUNTY COURT:
ASSESSOR:

Authority of county court to
adjust assessment on real estate.

November 13, 1950

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion. For sake of brevity, we will restate your request:

"The Assembly of God church organization owns a lake site in Morgan County, Missouri. On said site are the following buildings: tabernacle, chapel, church, well and residence for caretaker. Also there are many private dwellings or residences located on said site. The Attorney General ruled the whole project taxable as no plat had been filed showing a division of property. The county assessor and county court just recently learned that said property had been subdivided and that the property under private ownership is now separated from that owned by the church organization by legal descriptions as shown by a plat recorded on the 28th day of February, 1950, in Morgan County, Missouri. The assessor has made up his books and same are nearly completed by the county clerk and practically ready to turn over to the collector for the collection of 1950 taxes. Can this be considered as an erroneous assessment that the county court would be required to adjust under Section 12214-1939."

Following your original request for an opinion, we requested additional facts and made inquiry as to what opinions you were referring to in your original request. You informed us that one was rendered to Honorable William S. Thompson, Prosecuting Attorney of Mercer County, Missouri, under date of October 17, 1946, which opinion holds that real property owned by a religious organization is not exempt from taxation when said property is not used exclusively for religious purposes. The other opinion was rendered to you under date of June 4, 1947, which held that in assessing real property, the

Honorable G. Logan Marr

assessor must base the assessment on the true value of said property. So, apparently this department has never specifically ruled on the ownership of all the property referred to in your request. That is a question of fact and since you do not inquire about that, we need not pass upon that question at this time.

Section 12214, R. S. Mo. 1939, referred to in your request, relates to registered voters under the election laws of this state and has nothing whatsoever to do with taxation. Apparently you meant to refer to Section 11214, R. S. Mo. 1939, which was repealed by the 65th General Assembly during a revision session and did not as of the date of making this request have said revision bills.

Section 11000.9, Mo. R.S.A., provides that books for assessment purposes shall be turned over to the county assessor at least 60 days prior to January 1 of each year and between January 1 and June 1 of each year, county assessor shall make a list of all real property in the county. For the sake of this opinion, we shall assume that the county assessor complied with the foregoing provision in assessing said real property since there seems to be no such question raised by your request.

Section 11000.35, Mo. R.S.A., further provides that the assessor shall be furnished a real estate book and a personal assessment book. That he shall describe in said real estate book the record owner of said land in the county and describe same. Furthermore, the assessor is required to consolidate all lands owned by one person in a square or block into one tract, lot or call and said provision provides for a penalty if he fails to do so. Said statute further places the burden on the assessor, in compiling said real estate book, to procure the descriptions of land and names of owners from the land list book kept by the recorder of deeds and to carefully note and enter in proper places all changes and names of owners or descriptions of land since compiling the last real estate book.

Section 11000.43, Mo. R.S.A., provides that every person who thinks himself aggrieved by the assessment of his property may appeal to the board of equalization. Section 11001, Mo. R.S.A., requires the county board of equalization to meet on the second Monday of July of each year in such counties as Morgan County, which is a third class county, at which time said board shall have power and duty to hear complaints and to equalize the valuation of assessments upon all taxable real property. Section 11004, Mo. R.S.A., requires that the county board of equalization shall in a summary way determine the appeals from the valuation of property made by the assessor and shall correct and adjust assessments accordingly. Under Section

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11033.14, subsection 5, Mo. R.S.A., the Legislature has provided for an appeal from the county board of equalization to the State Tax Commission by any owner of real property, which provision authorizes said Commission to investigate all such appeals and correct any assessments which are shown to be unlawful, unfair, improper, arbitrary or capricious. We understand that by rule of said Commission that it has fixed September 30 of the taxing year as a final date for appealing to said Commission.

This department, on September 5, 1947, rendered an opinion to Honorable Roy A. Jones, Prosecuting Attorney of Johnson County, Missouri. In that opinion reference was made to Section 10940, R. S. Mo. 1939, which has been repealed. However, the 63rd General Assembly enacted in lieu thereof Section 4, page 1800, Laws of Missouri, 1945, which provision contains practically the same language as Section 10940, supra, prior to its repeal and requires that every person owning or holding real property on the first day of January, including all such property purchased on that day, shall be liable for taxes thereon for the same calendar year. Said opinion held that any person owning property on that date who subsequently transfers same is not relieved from liability for taxes thereon even though said tax is not yet due and payable at the time of the transfer of said property.

In United States v. Certain Land Situate in City of St. Louis, Mo., et al., 86 F. Supp. 297, l.c. 302,303, the United States District Court of Missouri held that a lien for taxes on land attaches as of January 1, and furthermore that after said lien attached on January 1, there can be no proration of the tax; furthermore, in this case, the Court held that the United State of America in condemning said land in this state upon which a tax lien existed fixes a lien upon the award in the registry of the Court for such taxes. In so holding, the Court said:

"Prior to the new statutes some of the Missouri courts have described the tax lien which was in existence from the assessment date until the amount of the tax was definitely determinable by assessment and levy as being an inchoate lien. It is believed the legislature used 'fixed' prior to 'encumbrance' in the new statute, as in the Helvering case above, meaning the opposite of 'inchoate', and as indicating that an inchoate lien or encumbrance existed prior to the time that the amount of the taxes was definitely determinable by assessment and levy. When we consider the Missouri decisions dealing with tax liens; the definitions of the words 'accrue'

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and 'fixed'; together with Secs. 4 and 7, pp. 1800-1801, and 7, p. 1861, of the Missouri Laws of 1945, emphasis is added to the belief that the legislature meant by the new sections that an inchoate lien for taxes commenced on January 1, 1946, for 1946 taxes, and that said lien was a present enforceable demand which, under the new clause, became a fixed or settled lien in amount when the assessment and levies were determined."

* * * * *

"With respect to the second problem, when the lien for the tax attached on January 1, 1946, the courts have held there could not thereafter be any proration of the taxes. *St. Louis Provident Association v. Gruner*, supra, and *Collector of Revenue within and for the City of St. Louis, Missouri v. Ford Motor Company*, supra."

In *Long v. City of Independence*, 229 S.W. (2d) 686, 1.c. 690, the court, in holding that a lien for state and county taxes becomes fixed as of January 1, said:

"Sec. 10942.3 provides: 'Every person owning or holding real property or tangible personal property on the first day of January * * * shall be liable for taxes thereon during the same calendar year.' Here the date is used, not as an assessment date, but as a date for fixing 'liability for taxes,' in amounts thereafter to be determined. Appellants here seek (and some courts have been so inclined) to endow the lien-attaching date with powers which it does not possess. The lien for state and county taxes is inchoate and becomes 'fixed in amount by relation back to that date after the assessment and levy was completed.' (Cases cited.)"

A primary rule of construction of statutes is to ascertain and give effect to the lawmaker's intent. See *Donnelly v. Keitel*, 193 S.W. (2d) 577, 354 Mo. 1138. Appellate courts in this state have repeatedly announced the following principle of law: That taxation is the rule and exemptions therefrom the exception, so that the burden is upon the one claiming exemption to bring himself clearly within the provisions of the statute providing for exemption and that such taxing

Honorable G. Logan Marr

statutes must be strictly construed. See State ex rel. St. Louis Young Men's Christian Association v. Gehner, 11 S.W. (2d) 30; also Adelpia Lodge No. 38, K.P., v. Crawford, 57 S.W. 1020, 157 Mo. 356.

In the instant case no plat showing a division of property was on file in the county as of January 1, 1950, the date under the law when the county assessor shall commence assessing property in the county, and on such date, such tax became a lien against said property even though the actual amount has not been determined as of that date. Therefore, the assessment for this year, 1950, is valid and the county court is unauthorized under the law to consider this assessment an erroneous assessment and adjust same.


CONCLUSION

It is the opinion of this department that the assessment made by the county assessor against said property for 1950 is valid and cannot be considered at this late date by the county court as an erroneous assessment and adjust same.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

ARR:VLM

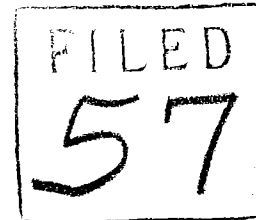
**PUBLIC OFFICERS:
FEES AND SALARIES:**

Offices of deputy sheriff and city marshal are not incompatible. Party holding these offices entitled to compensation provided for each.

November 17, 1950

FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Guenther Building
Versailles, Missouri



Dear Mr. Marr:

We are in receipt of your recent request for an opinion of this office, which reads in part as follows:

"D. D. is a deputy and gets \$150.00 per month as such deputy sheriff. Recently he took a job by appointment from the city to be the high marshal, and he gets \$150.00 monthly salary, and about \$50.00 in additional cash for checking and shaking doors of the business firms in the city.
* * * *

"The presiding judge of the county court who signs the warrants of the county for salaries, wants to know, if the county is authorized to pay him his deputy sheriff's salary when he is also getting a salary from the city for being night marshal? They do not object to him holding the two jobs, but do object to him drawing salaries for both jobs."

Regarding the holding of two public offices by one individual at the same time, we find the following stated by the court in the case of Bruch v. City of St. Louis (Mo. App.), 217 S. W. (2d) 744, 1. c. 748:

"The limitation at common law upon the holding of two or more offices at one and the same time extends no farther than to prohibit the holding of incompatible offices. Any further inhibition must be constitutional or legislative. 42 Am. Jur., Public Officers, sec. 59. * * * * *

Honorable G. Logan Marr

A careful study has revealed no constitutional or statutory prohibition against the holding of the offices of deputy sheriff and city marshal by the same individual. Regarding the common law principle of incompatible offices, the court in State ex rel. v. Bus, 135 Mo. 325, 1. c. 338, 36 S. W. 636, stated:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

In State v. Grayston, 163 S. W. (2d) 335, 1. c. 339, 349 Mo. 700, the court held that:

"* * * * The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

Honorable G. Logan Marr

The question therefore is whether or not the offices of deputy sheriff and city marshal are inconsistent and incompatible, and such as cannot be held by the same individual at the same time. This question has been decided by the Supreme Court of South Dakota in the case of Gulbrandson v. Town of Midland, 36 N. W. (2d) 655, 1. c. 658, where the court stated:

"The county suggests the point that the offices of town marshal and deputy sheriff are incompatible. It is true that the duty to keep the peace is common to both offices. But that fact, in our opinion, does not render the function of these offices inconsistent or antagonistic and thus render them incompatible. 42 Am. Jur. 936; Peterson v. Culpepper, 72 Ark. 230, 79 S. W. 783 2 Ann. Cases. 378."

In Peterson v. Culpepper, 79 S. W. 783, 1. c. 785, 72 Ark. 230, 2 Ann. Cases. 378, we find the following:

"In the case of State of Arkansas v. Townsend, 79 S. W. 782, a similar question to the question in this case was decided by this court (opinion Feb. 6, 1904), in which it was held that the duties of the offices of probate judge and recorder of a town were not incompatible, * * * * *."

"We are of the opinion that the chief of police of a city of the first class is not a state officer, and that there is no incompatibility between the office of sheriff and the position of chief of police. The duties and the powers of the two are sometimes the same, and the manner of discharging them is substantially the same. This falls within State v. Townsend (opinion by Chief Justice Bunn, Feb. 6, 1904) 79 S. W. 782."

We must therefore conclude that the offices of deputy sheriff and city marshal are not inconsistent and incompatible, and may be held by the same individual at the same time.

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Furthermore, as long as the individual in question retains the right and title to the office of deputy sheriff, he is entitled to the salary provided for that office. Compensation to the holder of a public office is an incident to the office. In the case of *Coleman v. Kansas City*, 173 S. W. (2d) 572, 1. c. 577, 351 Mo. 254, the court states:

"During the time Murray held the office, he is entitled to the salary fixed by law as an incident to that office
'Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.' State ex rel. Evans v. Gordon, 245 Mo. 12, loc. cit. 27, 149 S.W. 638, loc cit. 741.
Also, see State ex rel. Chapman v. Walbridge, 153 Mo. 194, 54 S. W. 447, State ex rel. Vail v. Clark, 52 Mo. 508."

CONCLUSION

It is therefore the opinion of this department that the offices of deputy sheriff and city marshal are not inconsistent and incompatible, and that these offices may be held by the same individual at the same time. Furthermore, as long as the right and title to each office is retained by the same individual, he is entitled to the compensation provided for each office.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

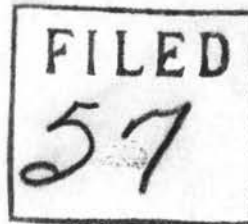
J. E. TAYLOR
ATTORNEY GENERAL

RHV:A

62/21
COUNTY BUDGET SYSTEM: Expenditures for maintenance of county roads including compensation for personal services cannot be paid out of class five having been budgeted as required by law under class three.

December 12, 1950

12/13/50



Honorable G. Logan Marr
Guenther Building
Versailles, Missouri

Dear Sir:

We have your request for an opinion of this department.
Your letter is as follows:

"Morgan County is a third class county. This is the month of November 1950. The funds set up in class No 3 of the County Budget for the upkeep, repair and construction of county roads and bridges has become exhausted. There is an unpledged, unobligated, unspent surplus in classes number one, two and five.

"The upkeep and repair of the county roads is a necessity and an emergency, and the money is needed to pay the cost of supplies and the wages necessary to pay the operators of the county road maintainers. The wages and the salaries of the county employees on the county road machinery was not estimated and set up in class number four or any other class, other than three.

"The agent in the State Auditor's Office of the State of Missouri, in charge of county budgets for counties of this size, which is a county of less than fifty thousand population, informed the County Clerk for the County Court, that any surplus of funds unexpended and unobligated in classes numbered, one, two, five, may be transferred to class number five, and the wage and salaries of county employees necessary to operate the county machinery repairing and upkeeping county roads, could and should be paid out of class number five after the surplus had been transferred. This was and is the kind of an emergencies so designated within the meaning of class number five.

Mr. G. Logan Marr

"After reading 198 S.W.(2d) 10, I want to know if it is legal for counties of this size and class to transfer surpluses in classes one and two and five to class, FIVE, and then to pay the expenses for wages and supplies for the road machinery in operation of county machinery in the repair and upkeep of county roads out of class Five? ? Ordinarily these expenses are paid out of class No. Three, but the funds in class three under the budget have become exhausted."

Since Morgan County is a county of the third class Sections 10910 to 10917, inclusive, R.S.A. Mo. 1939, are applicable insofar as its budget is concerned.

Section 10911, R.S.A. Mo. 1939, provides for the classification by the county court of the estimated expenditures of the county for the year and provides for six different classes and provides what type of expenditure shall be provided for under each class. The portion of this section relating to class 1,2,3,4 and 5 reads as follows:

"The court shall show the estimated expenditures for the year by classes as follows:

"Class 1. The County Court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.

"Class 2. * * * *

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. This shall constitute the third obligation of the county.

"Class 4. * * * *

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1,2,3,4 to class 5 to be used as

Mr. G. Logan Marr

contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

We call attention to the portion of the above quoted section included in paragraph 5 thereof which provides a fund for contingent and emergency expenses of the county which fund is to be derived from unexpended portions in classes 1,2,3 and 4, which are to be transferred to class 5 and which provides that contingent and emergency expenses are to be paid from this class 5 fund and then provides that "no payment shall be allowed from the funds in this class for any personal services, (whether salary, fees, wages or any other emoluments of any kind whatever estimated for in preceding classes." (Underscoring ours).

It appears to us that this class 5 fund is not available for the purpose of the road expenditures mentioned in your letter, which expenditures according to your letter involve wages and salaries of the county employees operating county road machinery, for the reason that the portion of Section 10911, last above quoted, specifically prohibits the use of the class 5 fund for "any personal services (whether salaries, fees, wages or any other emoluments of any kind whatever) estimated for in the preceding classes."

Furthermore, a portion of Section 10914, R.S.A. Mo. 1939, which pertains to class 5, provides that "purposes for which the court proposes the funds in this class shall be used shall be shown."

We are of the opinion that this means that the budget under class five shall show the purposes for which it is intended that the funds in class five shall be used. Your letter indicates that your county court desires to use some of the class five funds for the purchase of supplies and for wages to operators of county road maintainers. In the case of Elkins-Swyers Office Equipment Company v. Moniteau County, 209 S.W. 2d. 127, the Supreme Court of Missouri, after quoting the following provisions in that portion of Section 10914, supra, pertaining to class six,

"* * * The court shall show on the budget estimate the purpose for which any funds anticipated as available in this case shall be used.* * *"

held class six funds not budgeted under class six to be not available because not budgeted.

Mr. G. Logan Marr

We are of the opinion that in view of the similarity of these two provisions of the statute as to class five and class six, respectively, the logic of the above quoted decisions with reference to proposed class six expenditures is applicable also to class five expenditures and that class five funds therefore are not available for any purpose not budgeted under class five. Undoubtedly the expenditures referred to in your letter were not shown in the budget under class five because they were shown under class three.

CONCLUSION

We are accordingly of the opinion that funds in class five in your county cannot be used to pay the expenses involved in road maintenance which expenses were budgeted under class three.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SMW:mw

ELECTIONS:

HOLIDAYS:

Special referendum election to be held April 4, 1950 is not a "public holiday" within the meaning of Section 15310 R.S. Mo. 1939.

March 29, 1950.

3/30/50

FILED

59

Mr. A. E. McInerney,
State Grain Warehouse Commissioner,
1108 Board of Trade Building,
Kansas City, Missouri.

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Is the date of April 4, 1950, the date upon which the special referendum election is to be held, a public holiday?"

Section 15310 R.S. Mo. 1939 provides as follows:

"The following days, namely: the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, any general primary election day, any general state election day, any thanksgiving day appointed by the president of the United States or by the governor of this state, and the twenty-fifth of December, are hereby declared and established public holidays; and when any of such holidays falls upon Sunday, the Monday next following shall be considered such holiday."

The statute above set out, insofar as it is significant here, provides that any general state election day shall be a public holiday.

In order to determine the meaning of a general state election we turn to Section No. 655 R.S. Mo. 1939, which sets out additional rules for the construction and meaning of statutes

Mr. A. E. McInerney:

March 29, 1950

and certain words or phrases used therein.

Section No. 655 provides in part as follows:

" * * * the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially; * * * "

In the case of State v. Searcy 39 Mo. App. 393, 1.c. 405, the St. Louis Court of Appeals stated as follows:

"It is next objected that, whereas, according to the law in force at the time when this election was ordered and held, a general school election in all the counties of the state was required to be held on the first Tuesday in April, which was the second day of that month, and whereas the election ordered by the county court on the question of local option was held on the eleventh of February, which was within sixty days of the election of school directors, the election on the question of local option was void under the terms of the statute. The provision of the statute relating to elections on the question of local option outside of the corporate limits of any city or town are 'that no such election, held under the provisions of this act, shall take place on any general election day, or within sixty days of any general election held under the constitution and laws of this state, so that elections as are held under this act shall be special elections, and shall be separate and distinct from any other election whatever.' The Revised Statutes of 1879 contain this general provision: 'The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute. * * * Sixteenth, the term "general election" refers to the election required to be held on the Tuesday succeeding the first Monday of November biennially.' R.S. 1879, section 3126. This shows that the school election required to be held in April was not a 'general election,' within the meaning of the local option statute, and this disposes of this assignment of error."

Similarly, in Haas v. City of Neosho, 139 Mo. App. 293,

Mr. A. E. McInerney:

March 29, 1950

the Springfield Court of Appeals held as follows, l.c. 296:

"* * * It will be proper to consider these two sections together in determining this question. The first reads as follows: 'No election held under the provisions of this article shall take place on any general election day or within sixty days of any general election held under the constitution and laws of this State, so that elections as are held under this article, shall be special elections, and shall be separate and distinct from any other elections whatever.' The latter reads: 'Such elections shall not be held within sixty days of any municipal or State election held in such city, and shall be conducted and returns thereof made and the result thereof ascertained and determined in accordance, in all respects with the laws and ordinances governing municipal elections in such city.

"In section 4160, Revised Statutes 1899, it is provided as follows: 'The term "general election" refers to the election required to be held on Tuesday succeeding the first Monday in November.' The St. Louis Court of Appeals, in *State v. Searcy*, 39 Mo. App. 393, held that the general election proviso in section 3027, only applied to the November election, and the same court in *Dooley v. Jackson*, 104 Mo. App. 21, declared that the word 'elections' used in a similar statute, do not include primary elections. These cases are cited with approval by the Supreme Court in the recent case of *State ex rel. Van Stade v. Taylor*, 119 S.W. 373."

In *Greenwood v. City of El Paso* 186 S.W. (2d) 1015, the meaning of "general election" is discussed as follows, l.c. 1015:

"The words 'general election' popularly, and by themselves, mean the state-wide election held pursuant to general law every two years for selection of state, district, county and precinct officers."

It is therefore, manifest that the special referendum election on April 4, 1950, is not a general election. That it was the intention of the Legislature that such elections as that of April 4, 1950 were not to be public holidays is made clear by the wording of Section 15310, supra, in which provision is made for a public holi-

Mr. A. E. McInerney:

March 29, 1950.

day on the date of the state-wide primary elections. If the Legislature had intended that the term "general state elections" should include all state-wide elections, certainly there would have been no necessity for the specific provision regarding the primary. This latter fact is of particular importance here, for it is a well-known rule of statutory construction that the expression of one thing (primary elections) is the exclusion of another (other state-wide elections). *Crevisour v. Hendrix* 136 S.W. (2d) 404. That we must, in construing Section 15310 give to the term "general state elections" its ordinary and usual meaning is emphasized in *State v. Platner* 283 Mo. 508 as follows:

"The Court cannot assume that the Legislature, in the use of a word in the enactment, intended to give it a meaning radically different from that ordinarily attached, without some explanation of such intention; * * * "

Or as was stated in *Lansdown v. Faris* 66 F. (2d) 939:

"In examining the language of statutes, the courts must take words in their common meaning."

To sum up then, Section 655 R.S. Mo. 1939, as well as the several cases heretofore cited, have made it too clear for further discussion that the term "general election" means in this State, the election held on the Tuesday succeeding the first Monday of November, biennially. It also seems apparent that, if the Legislature had intended that all state-wide elections should be public holidays, it would have been unnecessary to specifically single out the state-wide primaries. Further, it would appear that the normal and intended meaning of "general state election" is simply the general election as defined in Section 655, *supra*. To attach any other meaning to the use of the word "state" is to twist and obscure the plain and evident purpose of Section 15310 and to ignore sound and established rules of statutory construction.

CONCLUSION

It is, therefore, the opinion of this office that the

Mr. A. E. McInerney:

March 29, 1950.

referendum election to be held in Missouri April 4, 1950, is not a public holiday.

Respectfully,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
Attorney General.

HJD:cg



AGRICULTURE: Agricultural seeds containing noxious weed seeds
must not indicate that there are no noxious
SEEDS: seeds when such seeds are present.

April 29, 1950

5/1/50

Mr. James P. McGinnis, Director
Seed Division
Department of Agriculture
Jefferson City, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"Will you please give us a written opinion as to whether or not a seed labeler is permitted to show 'None' or leave the space blank following noxious weeds on a label of field seed if three or more noxious weed seeds are present in a fifty (50) gram working sample.

"Section 14268, Subsection (d) requires the labeler to show the name and number of noxious weed seeds which are present singly or collectively when in excess of 1 in 5 grams of timothy, redtop, tall meadow oat grass, orchard grass, etc. In a fifty (50) gram working sample the labeler is permitted ten (10) plus the Federal tolerance of two (2), or a total of twelve (12).

"A number of labelers have been labeling their seeds "None" or leaving the space blank following noxious weeds if though eight (8) to ten (10) are present. Regulation 6 in part reads as follows: 'Blank spaces on the label will be deemed to imply 'None' when such interpretation is reasonable."

Section 14268, Revised Statutes of Missouri 1939, referred to in your letter, provides as follows:

April 29, 1950

"Every lot of agricultural seeds, as defined in section 14265 of this article, except as herein otherwise provided, when in bulk, packages, or other containers of one (1) pound or more, shall have affixed thereto, in a conspicuous place, on the exterior of the container of such agricultural seeds, a plainly written or printed tag or label in the English language, stating:

(a) Commonly accepted name of such agricultural seeds.

(b) The approximate percentage by weight of purity; meaning, the freedom of such agricultural seeds from inert matter and from other seeds distinguishable by their appearance.

(c) The approximate total percentage by weight of weed seeds, the term 'weed seeds' as herein used being defined as the noxious weed seeds or bulblets listed in sub-section (d), and all seeds not listed in section 14265 as agricultural seeds.

(d) The name and number of each kind of the seeds or bulblets of the following named noxious weeds which are present, singly or collectively, as follows: (1st) in excess of one seed or bulblet in each five (5) grams (approximately one-sixth of one ounce avoirdupois) of timothy, redtop, tall meadow oat grass, orchard grass, Canada bluegrass, Kentucky bluegrass, fescues, brome grasses, perennial and Italian rye grass, crimson clover, red clovers, white clover, alsike clover, sweet clover, lespedeza, alfalfa, and all other grasses and clovers not otherwise classified; (2nd) one in twenty-five (25) grams (approximately six-sevenths of an ounce avoirdupois) of millets, rape, flax and other seeds not specified in first (1st) or third (3rd) of this sub-section: (3rd) one in one hundred (100) grams (approximately

April 29, 1950

three and one-half ounces avoirdupois) of wheat, oats, rye, barley, buckwheat, vetches and other seeds as large or larger than wheat; and for the purpose of this section the following shall be defined as noxious weeds; quack grass, dodders, Russian thistle, wild carrot, buckhorn and other varieties of plantain, wild onion, red sorrel, ox-eye daisy, garlic, and such other weeds as the state department of agriculture may designate as noxious.

(e) The approximate percentage of germination of such agricultural seeds (including hard seed) the month and year said seeds were tested.

(f) The percentage of hard seeds.

(g) The full name and address of the vendor of such agricultural seeds, together with the number of said vendor's permit.

(h) Name of state and, in case of field corn, county, where seed was grown, and if this is unknown, a statement to that effect."

It is to be noted that such section pertains to labeling only, and the only prohibition against selling agricultural seeds containing prohibited weed seeds is found in Section 14271. Therefore, as long as the provisions of Section 14268 are followed and agricultural seeds are labeled correctly, such seeds may be sold even though the noxious weed seeds exceed the tolerances allowed by sub-section (d).

We believe that the name and number of the noxious seeds need not be listed unless the tolerances allowed by sub-section (d) are exceeded. However, we believe it to be contrary to the requirements of the act to place on the label after a listing of "noxious seeds" the term "none" or leaving such space blank if as a matter of fact there are noxious weed seeds in the agricultural seed, even though such noxious weed seeds are within the tolerances allowed by sub-section (d).

When there are noxious weed seeds in agricultural seed within the tolerances allowed by sub-section (d) such fact

Mr. James P. McGinnis

April 29, 1950

must be stated on the label, that is, instead of listing "none" or leaving a blank after "noxious weed seeds" on the label, the listing must be that noxious weed seeds are present only within the tolerances allowed by sub-section (d), Section 14268, Revised Statutes of Missouri 1939.

CONCLUSION

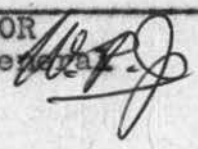
It is the opinion of this department that where noxious weed seeds are present in agricultural seed, but not in excess of the tolerances allowed by sub-section (d), Section 14268, Revised Statutes of Missouri 1939, when in bulk, packages or other containers of one pound or more, the label of such agricultural seed should not list "none" or leave a blank space after the term "noxious weed seed" but should show that the noxious weed seeds do not exceed the tolerances allowed by sub-section (d) of Section 14268, Revised Statutes of Missouri 1939.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General



CEB:lrt

AGRICULTURE: Mixed whole grains are not "commercial
feeding-stuffs" and, therefore, not subject
FEEDS: to Missouri Feed Law.

9-19-50.

September 16, 1950

Mr. James P. McGinnis
Director of Feed Division
Department of Agriculture
State of Missouri
Jefferson City, Missouri



Dear Sir:

This is in answer to your letter of recent date
requesting an official opinion of this department and
reading as follows:

"Will you please give us an opinion
on Section 14319, Revised Statutes of
Missouri, 1939, specifically as to
whether or not mixed whole grains is
classed as a commercial feed and
covered by the Missouri Feed Law.

"You will note that Section 14319 lists
feeds that are not covered by the
Missouri Feed Law and does not include
a mixture of whole grains or seeds.

"We have a dealer who contends that
mixed whole grains is not a commercial
feeding-stuff and should not be
required to abide by the Feed Law
and Feed Regulations."

Section 14319, Revised Statutes of Missouri, 1939,
provides as follows:

"The term 'commercial feeding-stuffs'
shall be held to include all feeding-
stuffs used for feeding livestock
and poultry, except whole seeds or
grains, the unmixed meals made directly
from the entire grains of corn, wheat,

Mr. James P. McGinnis

September 16, 1950

rye, barley, oats, buckwheat, flaxseed, kaffir, and milo, whole hays, straws, cotton seed hulls and corn stover, pure corn chops and pure ground ear corn, when the same are not mixed with other materials, but the term shall not apply to other materials containing sixty (60) per cent or more of water."

It is to be noted that in such section "whole seeds or grains" are excepted from the definition of "commercial feeding-stuffs." Nothing is said in such section as to whether or not such whole seeds or grains may consist of mixtures. However, the following provision relative to meals made directly from the entire grains of certain specified crops does apply only to the "unmixed meals."

Since it is specifically provided that only the unmixed meals made from whole grains of certain crops are excepted from the definition of "commercial feeding-stuffs" and no provision is found relative to "whole seeds or grains" we believe that whole seeds or grains mixed or unmixed do not come under the classification of "commercial feeding-stuffs" and are, therefore, not covered by the Missouri Feed Law.


CONCLUSION

It is the opinion of this department that mixed whole grains do not come within the definition of "commercial feeding-stuffs" as such term is used in Section 14319, Revised Statutes of Missouri, 1939, and that such grains, therefore, do not come within the provisions of the Missouri Feed Law.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

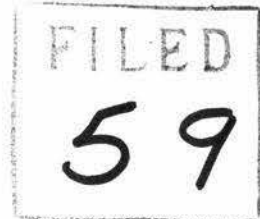
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STATE HISTORICAL SOCIETY:

State Historical Society is an agent of the state and not subject to suit.

December 9, 1950

Honorable Allen McReynolds
McReynolds, Flanigan & Flanigan
Attorneys at Law
Carthage, Missouri



Dear Senator McReynolds:

We are in receipt of your recent request for an opinion concerning the liability, if any, of the State Historical Society of Missouri because of an alleged infringement of copyright in the publication of two songs in the four-volume set of Ozark Folk Songs published by the Society. You enclose with your inquiry correspondence from persons claiming to be the owners of the copyright of these two songs.

Your inquiry presents the question:

Assuming that there was an infringement, is the State Historical Society liable in an action brought by the holders of the copyright?

You suggest the further question as to whether the publication in fact constitutes an infringement of the copyright.

In view of the conclusion reached as to the question of law presented, it seems unnecessary to attempt to answer the question as to whether there was an infringement further than to say that from the available evidence this seems very doubtful.

The State Historical Society of Missouri is an agency of the state created by statute (Sections 14902, 14903 and 14904, R. S. Mo. 1939). Its rights and duties are prescribed by statute and it is supported by appropriations of state funds. Among its duties is

". . . to publish, from time to time, reports of its collections and such other matters as may tend to diffuse information relative to the history of this region"

Honorable Allen McReynolds

In pursuant of this duty it published the four-volume collection of Ozark Folk Songs. The publication was not for profit and we are informed that the receipts from sales will pay only a small part of the cost of the publication.

The general doctrine of the immunity from suit of the state and its agencies is well settled.

In the Article on States in Corpus Juris, it is said:

"A state, by reason of its sovereignty, is immune from suit and it cannot be sued without its consent, in its own courts, the courts of a sister state, or, by an individual, in the federal courts." (59 C. J. 300)

Further quotation from this work is:

"SUITS AGAINST STATE OFFICERS AND AGENCIES -- (a) IN GENERAL. While a suit against state officials or agencies is not necessarily a suit against the state, the general rule that a state cannot be sued without its consent cannot be evaded by making an action nominally one against the servants or agents of a state when the real claim is against the state itself, and it is the party vitally interested. Accordingly it is well settled, as a general proposition, that, where a suit is brought against an officer or agency with relation to some matter in which defendant represents the state in action and liability, and the state, while not a party to the record, is the real party against which relief is sought so that a judgment for plaintiff, although nominally against the named defendant as an individual or entity distinct from the state, will operate to control the action of the state or subject it to liability, the suit is in effect one against the state and cannot be maintained without its consent." (59 C. J. 307)

The Supreme Court of this State has passed on this question and in Zoll v. St. Louis County, 343 Mo. 1031, 124 S. W. (2d) 1168, the Court said:

"The courts of this state have consistently held that, absent consent of the state, its

Honorable Allen McReynolds

agencies can not be sued in damages from whatever source caused, except when acting in a private or proprietary capacity as was the case in Hannon v. St. Louis County, supra [62 Mo. 313] It is the prerogative of the state to determine when suit may be maintained against it or its agencies and when not."

In this case the Court cites numerous cases holding the state and its agencies not subject to suit and holding that Section 21 of Article II of the Constitution of 1875 and Section 26 of Article I of the Constitution of 1945 are not a consent by the state to be sued.

The case of Lias v. Harmony Society Historical Association, 88 Pennsylvania Superior Court 534, involves action against a historical society with duties similar to those given by law to the State Historical Society of Missouri. In that case the Court said (1. c. 541):

"We are clear that under the undisputed facts in this case the defendant was engaged in rendering service of 'a public character, for a high order of public benefit,' for the state and is entitled to the benefit of the rule of law exempting agencies of the state from liability for negligence in the performance of functions of government delegated to them by the state."

The case of Zoeller v. State Board of Agriculture, 173 S.W. 1143 (Kentucky), was an action for damages for personal injuries sustained by plaintiff at the State Fair which was conducted by the defendant Board of Agriculture. The injury was sustained because plaintiff was struck and injured by a mounted musician who was employed by the State Board of Agriculture to furnish music at the Fair. The court held that the State Board was not liable and said (1. c. 1144, 1145):

"It is an elementary principle of the law, however, that the state cannot be sued for the negligent or malicious acts of any servant of any agencies of the state which perform governmental functions, nor can such agencies be sued for torts of its servants. The question for determination seems to be as to whether or not the State Board of Agriculture, in conducting the Kentucky State

Honorable Allen McReynolds

Fair, exercises a governmental function. If it does, it is then not liable for the torts of its officers, agents, or employees. If it does not exercise a governmental function, then it is liable for the torts of its officers and agents.

.

"The State Board of Agriculture is not a corporation for a pecuniary profit, and no person connected with it has any pecuniary interest in it. Such a corporation as this is not subject to the rules prescribed by law for private corporations, created and maintained for the benefit of their stockholders. The fact of its charging a fee for admittance to the exhibitions at the State Fair is far from being conclusive upon the subject of its public character. The asylums for the insane, in this state, as said in the case of *Leavell v. Western Ky. Asylum*, supra, are corporate bodies, with power given to them by the statute to sue and be sued, to contract and be contracted with, and they, likewise, receive patrons from other states, and charge therefor, and charge the estate of such citizens of the state, as may be confined therein, for their maintenance while there; yet this court has undeviatingly held that they, and other such as they, are not liable for the tortious acts of their officers or servants. This court, in the case supra, saying:

'We are of the opinion therefore that the right given appellee by the statute to sue, and to others to sue it, is to be taken in a qualified sense, and should not be so construed or extended, as to make it responsible to persons injured by reason of the misconduct or negligence of its inmates or employees.'

Honorable Allen McReynolds

CONCLUSION

It is our opinion that the State Historical Society of Missouri is an agency of the state and not subject to suit because of alleged infringement of copyright in its publications.

Respectfully submitted,

WALDO P. JOHNSON
First Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

324 Daniel
CANCER HOSPITAL:
CAPACITY TO ACCEPT GIFTS
OR BEQUESTS:

The State Cancer Commission acting on behalf of The Ellis Fischel State Cancer Hospital may accept all such gifts or bequests as are consistent with the purposes for which the hospital was organized.

February 3, 1950

2-8-50

Doctor C. W. Meinershagen
Acting Administrator
The Ellis Fischel State
Cancer Hospital
Columbia, Missouri



Dear Sir:

We have your recent request for an opinion. Your letter is as follows:

"This hospital has, in times past, received money for its construction in which the PWA participated with the State of Missouri and subsequently one gift designated to be used for the purchase of radium and quite recently a bequest from a deceased person's estate.

"I would like to have an interpretation as to the right of the hospital to accept money with specific reference to the last bequest mentioned. It would also be desirable for the hospital to know under what conditions money could be received for specific expenditures as gifts from individuals or estates. This institution is not empowered under the act establishing the hospital passed by the 59th Assembly to receive money except from counties of residence of patients sent in here and then only a maximum of \$5.00 per month per patient. This money, in turn, is forwarded to the State Treasurer and becomes a part of general revenue.

"We would like to be able to accept gifts and to expend the money as the donor designates. I have spoken to Dr. Adams regarding this problem and he asked that I communicate with you for your opinion."

The fundamental question here is whether or not the Cancer Hospital may accept gifts or bequests from private persons. The

Doctor C. W. Meinershagen

question, "Under what conditions may the hospital accept such gifts?" is secondary, for it is eminently clear that if gifts could be accepted, the conditions of acceptance are limited only to the extent that the purposes of the gifts are inconsistent with the objects for which the hospital was organized.

As stated in Thompson, Wills, 1947, 132, 76, 79, 80:

"* * * a municipal corporation may take a devise or bequest * * * in trust for any purpose germane to the object of its organization."

It is important, but not in any way decisive of the question here, to note that any gifts so offered would have to be accepted by the Cancer Commission, rather than the hospital itself, for the reason that the commission is the body designated to create and govern said institution, consistent of course with the statutory powers and control of the Director of the Department of Public Health and Welfare.

Section 15142, R. S. Mo. 1939, is as follows:

"The governor of the state of Missouri is empowered to appoint with the advice and consent of the state senate a cancer commission for the state of Missouri, consisting of four (4) qualified voters of the state. The cancer commission shall appoint by and with the consent and advice of the governor an administrator to have charge of the operation and conduct of said cancer hospital."

Section 15143, R. S. Mo. 1939, is as follows:

"The cancer commission of the state of Missouri is hereby empowered and directed to establish a hospital to be known as the state cancer hospital."

An examination of the authorities on the primary question - may a public institution, such as the State Cancer Hospital, accept gifts and bequests from private sources, reveals the following:

57 Am. Jur. 143:

"The prevailing American rule is that a

Doctor C. W. Meingerhagen

city may receive a legacy or devise for the purpose of applying the property to a public use consistent with the purposes for which the city is organized. The same has been said to be true of a county, school township, or incorporated school district * * *."

57 Am. Jur. 144:

"* * *The courts favor devises and bequests for charitable uses."

26 Am. Jur. 589:

"Hospitals are regarded as public charities however whether their corporate charter is public or private."

Page 590, supra:

"* * * hospitals * * * may take and hold, by way of grant, devise or bequest real or personal property * * * and may act as trustees if not expressly forbidden by their charter * * *."

In the very recent case of Mississippi Trust Co. v. Ruhland, 222 S. W. (2d) 752, a unanimous court, in holding proper a bequest to the State Federal Soldiers' Home, said as follows, l.c. 752:

"The heirs * * * contend that in the absence of specific legislative authority, it is the policy of Missouri to deny to state institutions the capacity to accept gifts, including testamentary gifts, from private individuals. The trial court, in a well considered opinion, reached the opposite result; and we agree thereto."

(Underscoring ours.)

The court then continued at page 752:

"Since the statutes of mortmain are not in force in this country, and our wills acts seldom impose restrictions on public corporations taking by will, there is no valid

Doctor C. W. Meingerhagen

reason for denying such corporations the right to receive a legacy or devise in trust for a proper public purpose."

(Underscoring ours.)

In Laws of Missouri, 1947, Vol. I, page 296, Sec. 643, there appears the following section:

"Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this State, the Director of Revenue shall be and is hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor or assignor of said property and said official, so that the right and title to such property shall pass to and vest in this State, and all such property so vested in this State and the proceeds thereof when collected may be appropriated for educational purposes, or for such other purposes as the legislature may direct

"Approved March 11, 1947."

It is believed that this section is not applicable to the present situation. Apparently this statute was written to cover those cases where a devise, bequest or gift might be made or offered generally, as "to the State of Missouri." On the other hand, where the gift has been specifically bequeathed to a public board or corporation, such as the State Cancer Hospital, there is no necessity, and in fact it would seem to be a forced interpretation, to apply said section.

Section 643, supra, was altered slightly by the 1947 Act, in that it formerly provided that the Board of Education should be the body authorized to receive gifts made to the state, whereas it now vests that function in the Director of Revenue. This change is not significant here, however.

The court in the Ruhland case, supra, refers to this statute, sets it out, and yet it holds that the Soldiers' Home could accept the bequest, thus substantiating our view that Section 643 does not operate to prevent the acceptance of bequests by such institutions as the Soldiers' Home and the State Cancer Hospital. The court, in the Ruhland case, on page 754, in referring to a statute specifically

Doctor C. W. Meinershagen

authorizing the Federal Soldiers' Home to accept grants and devises of land stated:

"This amendment, as well as other similar enactments with respect to other state agencies, was in affirmance of the common law, * * * as developed hereinbefore; and, so far as the capacity of the state to accept testamentary gifts is involved, was declaratory thereof and the more clearly established the common law as being in force and effect."

The court concludes the Ruhland case of page 754 of 222 S. W. (2d) by stating:

"What we have said rules the case. However, we also mention, without discussion or passing upon the holding, that the trial court was of the opinion said Laws 1945, p. 1758, if additional authority were needed, was effective to authorize the Federal Soldiers' Home to accept the gift under Rosa Ruhland's will, for the reason said Home is a charitable institution and the rule is well settled that a court will not permit a bequest to such an institution to fail; citing Missouri Historical Society v. Academy of Science, 94 Mo. 459, 466, 8 S.W. 346, 347; Harger v. Barrett, 319 Mo. 633, 642, 5 S.W. 2d 1100, 1104(9); In re Rahn's Estate, 316 Mo. 492, 510 (III), 291 S. W. 120, 127 (5,6) 130 51 A.L.R. 877; Mo. R. S. A. Sec. 9363; Lehnerr v. Feldmann, 110 Kan. 115, 202 P. 624, 625, 627."

In connection with the above we again refer to 26 Am. Jur. 589, which states that hospitals, public or private, are regarded as charitable institutions. The foregoing, particularly the Ruhland case, in controlling here and leads inevitably to the conclusion that the hospital may accept gifts and bequests.

CONCLUSION

It is the opinion of this office that the State Cancer Commission may accept gifts and bequests on behalf of The Ellis Fischel State

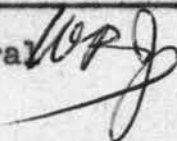
Doctor C. W. Meinershagen

Cancer Hospital, so long as such gifts or bequests are consistent with the purposes for which said hospital was organized.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General 

HJD:hr

TAXATION:
REVENUE:

Title Insurance Companies, organized under the provisions of Article 17, Chapter 37, R. S. Missouri, 1939, exempted from payment of franchise tax to extent assets of corporation reasonably allocated to such insurance business.

January 17, 1950

FILED

62

Honorable Charles A. Miller
Commissioner, State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"Will you kindly advise this Commission if it is necessary, under the new laws covering Title Insurance Companies, for this type of a corporation to make a return and pay a corporation franchise tax. We refer to the companies organized under Article 17, Chapter 37, R. S. Mo. 1939.

"While it is not customary to ask for more than one reply to a request, we are going to take the liberty of asking at this time if all insurance companies who now pay an annual premium tax of 2%, are relieved from making a return and paying a franchise tax."

Title Insurance Companies of the type referred to in your letter of inquiry are those which have among their chartered purpose the writing of title insurance as provided for in Article 17, Chapter 37, R. S. Missouri, 1939.

Your attention is directed to Section 6098a, Missouri R.S.A., which provides in part as follows:

"Every insurance company or association organized under the laws of the State of Missouri and doing business under the provisions of Articles 2, 7 and 17, of Chapter 37, Revised Statutes of Missouri, 1939, and every mutual mutual fire insurance

Honorable Charles A. Miller

company organized under the provisions of Article 6, Chapter 37, Revised Statutes of Missouri, 1939, shall, as hereinafter provided, annually pay, beginning with the year 1945, a tax upon the direct premiums received by it from policyholders in this state, whether in cash or in notes, or on account of business done in this state, for insurance of life, property or interest in this state, at the rate of two per cent (2%) per annum, * * *

(Underscoring ours.)

You will note that Title Insurance Companies have been specifically included in this statute imposing the direct premium tax of two per cent.

Section 4997.135, Missouri R.S.A., provides for the imposition of the Missouri franchise tax. We find the following exemption contained therein:

"* * * Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their premium receipts in this state: * * *

(Underscoring ours.)

Further, with respect to reports required to be filed, we find the following contained in Section 4997.136:

"Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the State Tax Commission annually on or before the first day of March in such form as said Commission may prescribe. * * *

(Underscoring ours.)

From the foregoing it appears that Title Insurance Companies, organized under the provisions of Article 17, Chapter 37, R. S. Missouri, 1939, have been exempted from liability to make a return and pay the Missouri franchise tax.

Honorable Charles A. Miller

We are further advised, however, that many companies engaged in the title insurance business and qualified under Article 17 of Chapter 37, R. S. Missouri, 1939, also engage in other businesses, particularly that of the preparation of abstracts, certificates to abstracts, and other similar activities. We understnad that this portion of the business of such companies is not strictly "title insurance" business.

It, therefore, seems that a corporation having as a part of its charter power the right to engage in "title insurance" business may be exempted from the Missouri franchise tax only to the extent of the portion of its assets necessarily and actually used in connection with this phase of its business, and that if such corporation engages in other business, it will remain liable for the payment of Missouri franchise tax based upon the value of its assets used in such other business. What has been said heretofore with respect to the exemption from the Missouri franchise tax of title insurance companies paying the two per cent direct premium tax is equally applicable to all other insurance companies paying such direct premium tax.

CONCLUSION

In the premises we are of the opinion that Title Insurance Companies, organized under the provisions of Article 17, Chapter 37, R. S. Missouri, 1939, which pay a two per cent direct premium tax upon premiums collected for policies of insurance, are exempted from filing a return and the payment of any Missouri franchise tax.

We are further of the opinion that if such corporations engage in other business activities, such corporations are liable to file the return required and pay the Missouri franchise tax upon such portion of the assets of such corporation as are employed in such other business.

We are further of the opinion that all insurance companies which are subject to the Missouri two per cent direct premium tax are relieved from the filing of a return and payment of Missouri franchise tax.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

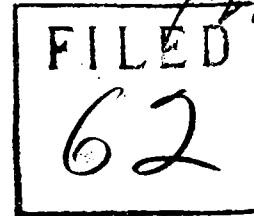
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MISSOURI STATE SOIL
DISTRICTS COMMISSION:

The official rules and procedures for fair and impartial referendums on the establishing of soil districts and a selection of soil district supervisors that have been submitted to this department should be and are hereby approved, subject to the modifications and recommendations suggested herein.

February 17, 1950

Missouri State Soil Districts Commission
Columbia, Missouri



Gentlemen:

We have been requested by you to give our official opinion regarding the official rules and procedures for fair and impartial referendums on the establishing of soil districts and the selection of soil district supervisors, and to make changes and modifications in the same which we might deem advisable. Your copy of said official rules and procedures that was submitted to us is as follows:

OFFICIAL RULES AND PROCEDURES
FOR FAIR AND IMPARTIAL REFERENDUMS
ON THE ESTABLISHING OF SOIL DISTRICTS
AND THE SELECTION OF SOIL DISTRICT
SUPERVISORS.

(Issued by State Soil Districts Commission)
Columbia, Mo., March 19, 1949.

Local Committee and Judges--Read Carefully.

1. Provide sealed ballot boxes and open polls promptly at time advertised. The ballot boxes must be substantially constructed, securely locked and left locked throughout the referendum.
2. Furnish official ballots (suggested form is attached) in sealed packages stating the number included. Ballots not used should be returned to the Organization Committee in the county agent's office in a separate package. The sum of those used and returned unused should equal the total number received.
3. Only one vote is allowed per farm either by the owner, or his legal representative. The interpretation by the State Soil Districts Commission of what constitutes a farm is the same as the interpretation of the AAA, now PMA. A tract of land must be operated as an independent farm enterprise to

State Soil Districts Commission

entitle its land representative to a single vote. Two or more tracts of land that are operated by one management as an independent farm enterprise will be entitled to one vote. The size of each farm must be at least 3 acres or more. The latest information available from local PMA committees relative to the total number of farms within the proposed soil district will be used by the State Commission in their determination of whether or not a substantial expression has been demonstrated, as required by law.

4. Each farm owner personally may cast as many votes in the soil district referendum and election of supervisors as he owns independently operated farms. (See paragraph 3 for definition of a farm) If it is impossible for the landowner to personally cast his eligible vote or votes because of absentee landownership, or sickness, or for any other reason, over which he has no control, the soil districts law provides that he may give a power of attorney to a taxpayer residing within the county to represent him in this referendum and election of supervisors. It is the policy of the Commission to require that such a taxpayer not be a legal land representative for more than one land owner, unless such legal representation has been established previously by reason of professional or paid farm managership. In addition, it is recommended that this taxpayer, given a power of attorney, be an individual who has something to say about the operation of the farm or farms throughout the year, and who would be in a position to work with the soil district if established. Acquisition by one individual of numerous powers of attorney and voting these powers of attorney as a bloc is considered by the Commission as outside the provisions of the law.

5. Three (3) official election judges are required by law for each polling place. They must be capable citizens within the proposed district, and shall be appointed by majority vote at the public hearing. Reasonable care should be taken to appoint a group of judges for each polling place which will represent both those who favor and those who oppose the organization of a soil district. If any appointed judge is not present at the polls on the day and time of the referendum, those judges present may select any citizen of the proposed district to serve in his or her place, and give him or her the necessary instructions. All instructions to judges must make clear that any person designated to conduct such a referendum or assist in such a referendum, and in that manner gains knowledge as to how any land representative voted and reveals such knowledge to any other person shall be guilty of a misdemeanor.

State Soil Districts Commission

- a. Judge No. 1. After determining voters' eligibility, delivers one ballot to him. (Unless otherwise provided by soil districts committee, voters should vote at a polling place in the area where the farm they own, or represent, is located.)
 - b. Judge No. 2. Should receive the ballot from the voter and place it in a sealed ballot box distinctly marked for the area. (If local committee decided to allow land representatives owning or representing land in other areas to vote at this polling place, the marked ballots of the land representatives from these other areas should be placed in extra separate ballot boxes provided and distinctly marked for the area in which such farms are located.)
 - c. Judge No. 3. Should list voter's name, address and other information called for on the listing sheet provided and marked for the area. (Suggested listing sheet is attached. If local committee decided to allow land representatives, owning or representing land in other areas, to vote at this polling place, the names, addresses, etc. of such voters should be listed only on the sheets provided and marked for the other areas. The total number of names on the listing sheets used should agree with the number of ballots used.)
6. Close the polls promptly at the closing hour designated but allow those who have entered the polling place before this time to complete their ballots.
 7. Immediately after closing the polls, the judges shall open the ballot boxes and carefully count the ballots cast. Tally on the tally sheet provided for the 'Referendum' the number of 'Yes' votes and the number of 'No' votes, and on the tally sheet provided for the 'Election of Supervisors' write plainly the names of the nominees in the proper spaces and tally the votes each receives on the lines just below their name. The nominee who receives the largest number of votes in each of the four areas will be declared elected a supervisor provided the State Soil Districts Commission finds that a substantial representation of opinion has been expressed, that two-thirds of those voting favor the establishment of a district, and declares the district established. (Suggested forms are attached.)

The referendum and election votes should all be tallied thus: ~~///~~ on the proper lines of 'Referendum' and on the 'Supervisor Election' Tally sheets provided. The totals of the votes cast in both cases should then be recorded in the indicated

State Soil Districts Commission

spaces. All three judges should sign 'Referendum' and 'Election' Tally sheet used before turning them in.

8. All blanks on 'List of Voters' and all 'Referendum' and 'Election' Tally Sheets must be correctly filled in.

9. The ballots after being counted shall be sealed up in a package by the judges at the polls, and shall not be inspected unless in case of a contested election, and then only on the order of the proper court. Arrangements should be made to return ballot boxes with all ballots (both used and unused), all used 'Listing Sheets, all used Referendum and 'Election' Tally Sheets, properly signed (by all 3 judges) and all supplies to the clerk of the county court or a place specified by the local committee, within 24 hours after polls are closed, where they shall be safely preserved for twelve months. Chairman of the local committee and the clerk of the county court shall report and certify to the total 'Referendum' vote by areas, and polling places and to the total Election votes, by areas for each nominee and send to secretary of State Commission. (A suggested copy of Report and Certification form is attached.)"

Rule No. 1 should provide for at least one notice of the day and place of election in each weekly newspaper in the county so that the land representatives have due notice of the election or referendum.

The statement in the Rule No. 4 that reads: "In addition, it is recommended that this taxpayer, given a power of attorney, be an individual who has something to say about the operation of the farm or farms throughout the year and who would be in a position to work with the soil district if established" be omitted because there is no legal or statutory basis for you to make this recommendation even though it is a desirable recommendation from a soil conservation standpoint. The last paragraph of said Rule No. 4 should read as follows: "Acquisition by one individual taxpayer of the county within which the proposed soil district will be located of more than _____ (you insert the number deemed reasonable) powers of attorney and voting thereby in more than one polling place is prohibited." It is undesirable for persons for or against the organization of a soil district to go around soliciting powers of attorney from landowners in order to have a large voting strength. If the limit is placed upon the number of powers of attorney one individual taxpayer may hold and vote, then a limit on the number of polling places in which such a voter may vote should be made because otherwise the judges would not know that such a person had voted at other polling places in the county in violation of the rule. The rule should be definite and should prohibit rather than state that such conduct is improper.

State Soil Districts Commission

The second sentence of Rule No. 5 should be modified to read as follows: "They must be residents of the proposed district, and should be capable and respected citizens. They shall be selected by a majority vote (voice, hand or written ballots) of the land representatives at the public hearing." The words select or selected should be substituted for the words appoint or appointed in Rule No. 5 because they are elected or selected by your rule by vote of the land representatives. The group does not have appointing power. The last sentence in Rule No. 5 might read as follows: "All instructions to judges must make clear that any person designated to conduct such a referendum or assist in such a referendum, and who thereby gains knowledge as to how any land representatives voted and reveals such knowledge to any other person shall be guilty of a misdemeanor."

The suggested forms for the tally sheets to be signed by the election judges were not attached. The tally sheets should have a statement at the bottom which would read as follows: "We hereby certify that the ballot boxes used at this referendum were opened in our presence at the beginning of the election and found to be empty; that the ballot boxes were opened in our presence at the close of the balloting, and that we counted the ballots therein and that the result shown above is the true and correct result of the referendum held on the _____ day of _____ 1950."

You might add another sentence to Rule No. 9 which would read as follows: "The State Soil Districts Commission will pay the county clerk the sum of \$_____ for his personal services in preserving the ballots and for certifying as to the result of the election or referendum." The county clerk might not wish to perform the duties that you are going to impose upon him by Rule No. 9. The county clerk's statutory duties do not include performing the acts required of that officer by Rule No. 9, and therefore he should be compensated for the same. The county clerk might refuse to have anything to do with the referendum and refuse to preserve the ballots. Your rules should provide that in the event that he declines to act, that the ballots be transmitted to the State Soil Districts Commission for safe keeping, together with all records and tally sheets in regard to said referendum."

We wish to call your attention to the fact that said official rules and procedures when adopted by you must then be filed with the Secretary of State to comply with Laws of Missouri, 1945, page 1504. Section 2 of said law provides as follows:

"(a) Each state agency shall file forthwith in the office of the Secretary of State a certified copy of each rule adopted by it, including all rules now in effect. The Secretary of State shall keep a permanent register of such rules open to public inspection.

"(b) Each rule hereafter adopted shall become effective ten days after such filing unless a later date is required by statute or specified in the rule."

State Soil Districts Commission

CONCLUSION

It is the opinion of this department that the official rules and procedures for fair and impartial referendums on the establishing of soil districts and a selection of soil district supervisors that have been submitted to this department should be, and are hereby, approved, subject to the modifications and recommendations suggested above.

Respectfully submitted,

Stephen J. Millett
STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw *[Signature]*

REFERENDUM AND SUPERVISOR ELECTION
BALLOT, AREA 1. INCLUDES _____
and _____ TOWNSHIPS. _____
_____, 194____.

Do you favor the creation of The Soil
District of _____ County?

Yes (Scratch one)

No

(The three nominees receiving highest
nominating vote for Area 1. List names
alphabetically.)

Vote for only one supervisor by placing
an X in the square before his name

REFERENDUM AND SUPERVISOR ELECTION
BALLOT, Area 2. INCLUDES _____
and _____ TOWNSHIPS. _____
_____, 194____.

Do you favor the creation of The Soil
District of _____ County?

Yes (Scratch one)

No

(The three nominees receiving highest
nominating vote for Area 2. List
names alphabetically.)

Vote for only one supervisor by
placing an X in the square before his
name.

(cut on this line)

(cut on this line)

REFERENDUM AND SUPERVISOR ELECTION
BALLOT, AREA 3. INCLUDES _____
and _____ TOWNSHIPS. _____
_____, 194____.

Do you favor the creation of The Soil
District of _____ County?

Yes (Scratch one)

No

Vote for only one supervisor by placing
an X in the square before his name

REFERENDUM AND SUPERVISOR ELECTION
BALLOT, AREA 4. INCLUDES _____
and _____ TOWNSHIPS. _____
_____, 194____.

Do you favor the creation of The Soil
District of _____ County?

Yes (Scratch one)

No

Vote for only one supervisor by placing
an X in the square before his name.

REPORT AND CERTIFICATION OF REFERENDUM AND ELECTION OF SUPERVISORS
FOR THE PROPOSED SOIL DISTRICT OF _____ COUNTY HELD _____

194

Vote

Polling Places		Yes	No
Area 1	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
Total referendum vote for Area 1		=====	=====
Area 2	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
Total referendum vote for Area 2		=====	=====
Area 3	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
Total referendum vote for Area 3		=====	=====
Area 4	_____	_____	_____
	_____	_____	_____
	_____	_____	_____
Total referendum vote for Area 4		=====	=====
Total referendum vote for proposed district		=====	=====

Name of Nominees	Address	Votes Received
Area 1	_____	_____
	_____	_____
	_____	_____
Area 2	_____	_____
	_____	_____
	_____	_____
Area 3	_____	_____
	_____	_____
	_____	_____

	Name of Nominees	Address	Votes Received
Area 4	_____	_____	_____
	_____	_____	_____
	_____	_____	_____

Total Election Vote in Proposed District _____

Certification:- The foregoing is a full, correct and true account
of the Referendum and Supervisor Election vote for
the proposed Soil District of _____ County,
held on _____
194 ____.

Signed: _____, 194____
Chm., Local Sponsoring Committee

_____, 194____
Clerk of the County Court

MAGISTRATE COURTS:
CIRCUIT COURTS:
FILING FEES:

Refund to plaintiff of filing fee paid to
Magistrate Court when change of venue is
taken to Circuit Court.

April 6, 1950

4/7/50

Honorable Willis H. Mitchell,
Judge of the Probate and Magistrate Court,
Ava, Missouri.



Dear Judge Mitchell:

We have your recent request for an opinion from this office.
In your letter of request you state substantially as follows:

"The plaintiff files a civil action in the
Magistrate Court, and pays his \$5.00 filing
fee. Under the present law the Clerk of said
court in turn sends the fee to the State at
the end of the month.

"The defendant takes a change of venue and
the Magistrate sends the case to the Circuit
Court. The clerk of the Magistrate Court
files his transcript with the Circuit Clerk,
showing the \$5.00 as costs. The case is then
heard in the Circuit Court, and the plaintiff
wins, entitling him to a refund of the \$5.00.

"The questions submitted are:

"By what authority can the Circuit Clerk collect
the amount of the fee from the defendant; what
happens if the defendant doesn't pay, and what
entries should the Circuit Clerk show so that his
books balance?"

As your letter suggests, the filing fee paid into the Magis-
trate Court by the plaintiff is not forwarded to the Circuit Court
upon a change of venue, but instead is sent to the Director of Reve-
nue or the County Treasurer as provided in Section 23a, p. 776,
Laws of Mo. 1945. We are enclosing an opinion of this office,
dated March 5, 1948, addressed to the Honorable W. L. Halbrook,
Judge of the Probate Court, Dent County, which rules on the dis-
position of the filing fee in cases similar to yours.

You ask under what authority can the Circuit Clerk collect
this \$5.00 from the unsuccessful defendant?

Hon. Willis H. Mitchell:

April 6, 1950.

It would seem that this \$5.00 filing fee, for purposes of your question, should simply be treated as part of those ordinary costs for which the losing party is liable as provided in Section 1406 R.S. Mo. 1939, as follows:

"In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

As to enforcing the collection of the costs from the defendant, we refer you to Section 1433 R.S. Mo. 1939 as follows:

"In all cases where costs shall be awarded, either before or upon final judgment, execution shall be issued therefor forthwith by the clerk, unless otherwise ordered by the party in whose favor such costs shall be awarded."

Finally, you inquire as to what entries the Circuit Clerk should make, regarding the \$5.00 fee, so that his accounts are in balance. As you state, the transcript sent up to the Circuit Court will show that a \$5.00 filing fee has been paid into the Magistrate Court. However, since the fee is required to be paid to the Director of Revenue or the County Treasurer, as explained above, the Circuit Clerk is not charged with receiving the fee and need not record it as a cash receipt in his books. Since he neither receives the original fee, nor pays it out, as such, there would not appear to be any difficulty in balancing his accounts.

CONCLUSION

It is, therefore, the opinion of this office, that the Circuit Clerk should, in case of a change of venue in a civil matter, collect the costs, including the \$5.00 Magistrate Court filing fee paid by plaintiff from the unsuccessful defendant, and may enforce said collection under the provisions of Section 1433 R.S. Mo. 1939. (2) Said filing fee should not be forwarded from the Magistrate Court to the Circuit Court and the clerk of the latter should show

Hon. Willis H. Mitchell:

April 6, 1950.

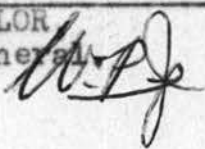
on his books, that this was paid to Magistrate Court, but should not show it as collected by the Clerk of the Circuit Court.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
Attorney General



HJD:cg

ROADS AND BRIDGES:

COUNTY COURTS:

Revenue derived from special road tax levied under Sec. 8527, Laws 1945, p. 1478, and retained by county cannot be expended on city streets which form a part of a continuous county road if the city lies within an "eight mile" special road district organized under Art. 10, Chap. 46, R. S. 1939.

May 25, 1950.

Honorable Roy C. Miller,
Prosecuting Attorney
Webster County,
Marshfield, Missouri.



Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"This letter is to request from your office an opinion on the following set of facts. The last sentence of Mo. R.S.A. Sec. 8527, Laws 1945, p. 1478, Sec. 1 provides in general that the County Court may, in its discretion, spend road money on city streets where they form part of a continuous road. It provides specifically that the money may be spent 'in any incorporated city or village in the county'. Section 10910, Mo. R.S.A. provides specifically that money in Class 3 cannot be spent on any road in a Special Road District. My inquiry is whether there is a conflict between these two sections and specifically whether the County Court may, in its discretion, spend money out of Class 3 on the streets of an incorporated city which is located in a Special Road District organized under Article 10, Chapter 46, R. S. Mo. 1939 - provided, of course, that such street forms part of a continuous highway of said county. Webster County is a Class 4 County and does not have a Township organization."

The County Budget Law, referred to in your letter, was originally enacted in 1933; section 10911 thereof was amended in Laws 1941, p. 650, and as amended reads in part as follows:

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated

Honorable Roy C. Miller,

revenue to be derived from sections 8526 and 8527, R. S. Mo. 1939. This shall constitute the third obligation of the county." (Under-scoring ours.)

At the time this section was enacted and in 1941 when it was amended, Section 8526 provided the county court should levy a tax upon real and personal property "of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'" Section 8527 provided for an additional levy to be used for road and bridge purposes to be designated as the 'special road and bridge fund' and provided that "all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district from which it arose, and shall be paid out to the respective road district upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village * * *." Section 8526 was repealed (L. 1945, p. 1478) and never re-enacted; Section 8527 was repealed and reenacted to provide for four-fifths (rather than all) the tax collected and paid upon property lying within a special road district, should be placed to the credit of the special road district from which it arose and the one-fifth part retained in the county treasury.

From the foregoing sections it will be found that funds for road and bridge purposes to be placed in Class 3 of the County Budget Law were to be derived from revenue obtained under authority of sections 8526 and 8527, R. S. Mo. 1939. These were the taxes derived under levies designated as general road and bridge levies and special road and bridge levies. Said sections 8526 and 8527 were repealed by the 63rd General Assembly, (Laws 1945, p. 1478). Under Section 12 (a) of Article X of the Constitution of Missouri, 1945, provisions are made for raising of revenue for road and bridge purposes. The taxes derived under this authority are in lieu of the taxes authorized under Sections 8526 and 8527, R.S.Mo. 1939. Said Section 12 (a) provides in part as follows:

Honorable Roy C. Miller,

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury to be used for road and bridge purposes.* * *"

In order to supplement the foregoing constitutional provision, the 63rd General Assembly in Laws, 1945, p. 1478, enacted the following law as section 8527, which now reads as follows:

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; Provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

Honorable Roy C. Miller,

From a reading of this section, it is found that the moneys derived under this section are placed in the county treasury and designated as the special road and bridge fund. This is the fund which now goes into and makes up the revenue for Class 3 demands under the Budget Act. You will note that four-fifths of the revenue arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose; that the one-fifth part remaining and the part of said special road and bridge tax arising from and paid upon property not situated in any special road district shall be retained in the county treasury to be expended from Class 3 of the County Budget Law. Since Class 3 of Section 10911, R. S. Mo. 1939, provides that funds in Class 3 of the county budget cannot be spent in any special road district, and since the special road and bridge fund of the county, arising under section 8527 is properly budgeted under Class 3 of the county budget, it appears that none of the money collected and retained by the county from the tax authorized by section 8527 can be spent in special road districts in the county.

Therefore, it is the opinion of this office that that part of the special road and bridge tax collected under the provisions of section 8527 (Laws, 1945), p. 1478), and retained by the county can be spent only in the road districts which are under the direct jurisdiction of the county court and cannot be spent in a special road district organized under Article 10, Chapter 46, R. S. Mo. 1939, nor upon the streets of an incorporated city therein.

Your attention is also directed to Article 10, Chapter 46, R. S. Mo. 1939, which provides the method by which territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as a special road district. As a part of that article Section 8691, Reenacted Laws, 1945, p. 1494, provides for the use of funds collected for road and bridge purposes under Section 8527 upon property within a special road district in the following words:

"In all counties in this state where the special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected for road and bridge purposes under the provisions of Section 8527 upon property within such special road district, or districts, or where money shall be collected for pool or billiard table licenses upon any business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, four-fifths of such part or portion of said

Honorable Roy C. Miller,

road and bridge tax so arising from and collected and paid upon any property lying and being within any such special road district, or districts, and also one-half of the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district; and the county court shall upon application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for four-fifths of such part or portion of said road and bridge tax so collected upon property lying and being within such special road district, or districts, and also one-half of the amount collected for pool and billiard table licenses so collected from such business carried on or conducted within the limits of such special road district, or districts."

You will note that this section was enacted at the same session which enacted Section 8527 and does not provide for the expenditure of the one-fifth part retained by the county, nor for that part of the tax upon any property lying outside the special road district to be spent within the special road district.

This opinion is consistent with prior opinions rendered by this office relating to the same subject. For your convenience we are enclosing an opinion addressed to the Honorable Walter Whinrey, dated March 1, 1948, dealing with a problem similar to that submitted by you.


CONCLUSION.

It is the opinion of this Department that the part of the taxes collected from property lying within an "eight mile" special road district and retained by a county under the provisions of Section 8527 (Reenacted Laws 1945, p. 1478) cannot be expended by the county court on city streets which form a part of a continuous county road if the city lies within a special road district organized under Article 10, Chapter 46, R. S. Mo. 1939.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General

APPROVED:


J. E. TAYLOR
Attorney-General

JEM/ld

ELECTION) Declaration of candidacy for Office of Probate Judge
) sufficient in counties where Probate Judge is also
) Magistrate.

June 15, 1950



Honorable Harold L. Miller
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Will you kindly advise whether or not in your opinion a candidate who files a declaration of candidacy for the office of 'Probate Judge' only, in a 3rd class county where the proper title to the office is now that of Probate Judge and Magistrate, has formally declared for any office and is entitled to a place and listing upon the ballots?"

Section 11550, Laws of Missouri, 1944, Ex. Sess., p. 24, provides in part as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless such candidate has on or before the last Tuesday of April preceding such primary filed a written declaration, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: * * *"

Honorable Harold L. Miller

Section 18 of Article V, Constitution of Missouri, 1945, provides in part:

"In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. * * *"

DeKalb County, according to the 1940 census, had a population of 9,751. Therefore, it falls within the constitutional provision above quoted. Under that constitutional provision, the office to be filled is judge of the probate court and the judge of the probate court is by virtue of his office judge of the magistrate court. Consequently, we see no deficiency in a declaration of candidacy for the office of probate judge in your county, where the person filing the declaration omits to specify that he is a candidate for judge of the probate court and magistrate.


CONCLUSION

Therefore, it is the opinion of this department that a declaration of candidacy for the office of probate judge in a county having less than 30,000 inhabitants is sufficient, and there is no necessity for stating that the office for which the candidacy is filed is for that of probate judge and magistrate.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh

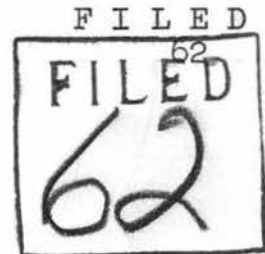
SOIL DISTRICTS COMMISSION:

Motor vehicles belonging to the Missouri State Soil Districts Commission must be sold by the state purchasing agent; Money received from the sale of said vehicles must be deposited in the State Treasury, and the Commission cannot spend such funds.

September 21, 1950

Missouri State Soil Districts Commission
Columbia, Missouri

Dear Mr. Longwell:



I.

We have received your request for an opinion upon the following propositions:

"The Commission now owns three automobiles--two are passenger cars and one is a pickup truck. The truck and one of the passenger cars are no longer considered necessary by the Commission. The Commission would like to know whether

"(1) It has authority to sell the truck or the passenger car, or both, for cash.

"(2) The money obtained from the sale of the truck or passenger car, or both, could be retained for expenditure by the Commission.

"(3) If the Commission can retain and spend this money, could it properly be used to supplement money appropriated for use by the Commission to pay the salary of an executive secretary."

II.

The Missouri Constitution of 1945 provides as follows:

"Article IV

"EXECUTIVE DEPARTMENT

"Section 15. The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly

Missouri State Soil Districts
Commission

into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

"Section 23. The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1945. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose.

"Section 28. No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and

Missouri State Soil Districts
Commission

every appropriation shall expire six months after the end of the period for which made."

"Article III

"Section 36. All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

"First: For payment of sinking fund and interest on outstanding obligations of the state.

"Second: for the purpose of public education.

"Third: For the payment of the cost of assessing and collecting the revenue.

"Fourth: For the payment of the civil lists.

"Fifth: For the support of eleemosynary and other State institutions.

"Sixth: For public health and public welfare.

"Seventh: For all other state purposes.

"Eighth: For the expense of the general assembly."

The Constitution of Missouri of 1875 had a section (Sec. 19,) Art. X) that provided that no money shall ever be paid out of the treasury of this state, or any of the funds under its management except in pursuance of an appropriation by law, etc., the provisions of this section have been implanted in Sections 23 and 28 of Article IV of the Constitution of 1945. The Supreme Court of Missouri in the case of *Nacy v. LePage*, 111 S.W. (2d) 25, l.c. 26, in construing said constitutional provisions said:

"The state treasurer, in his official capacity and in the funds of the state treasury, has no goods, moneys, or effects of any private citizen

Missouri State Soil Districts
Commission

in his custody, nor does he owe a debt from the treasury to any one. He is a custodian of public funds, raised by taxation, which belong to the state. His duty is to pay out these funds only 'in pursuance of an appropriation by law' which 'shall distinctly specify the sum appropriated, and the object to which it is to be applied.' Section 19, article 10, Constitution.* * *

The Laws of Missouri, page 1449 provide for a Division of Procurement headed by a state purchasing agent, and Section 69 of said laws at page 1452 provides as follows:

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the inventories of the departments concerned. He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof. He shall keep currently an inventory of all removable equipment owned by the state."

The Laws of Missouri, 1945, at page 1982, Section 17, provides as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and

Missouri State Soil Districts
Commission

expended by virtue of the provisions of the constitution of this state), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall wilfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor: Provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source: Appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

The appropriation for the State Soil Districts Commission for the period beginning July 1, 1949, and ending June 30, 1951, appears in the laws of Missouri, 1949, at page 144 and provides as follows:

"Personal Service:

"Salaries and per diem of officers, secretary
and other necessary employees - - - - \$5,000.00

"Additions:

"For the original purchase of furniture and office
equipment including material and supplies \$1,370.00

"Repairs and Replacements:

"For repair and replacement of furniture and office
equipment \$ 800.00

"Operation:

"General expense: consisting of communication,

Missouri State Soil Districts
Commission

printing and binding, transportation, travel
within and without the state, insurance and
premiums on bonds, stationery and office
supplies and other general expenses - - - \$11,830.00

"Total out of General Revenue Fund - - - 19,000.00

It is a well settled rule that "an appropriation law is to be construed under and by the same rules as other legislation." 59 C.J. 262. Also see State ex rel. McKinley Publishing Company vs. Hackman, 282 S.W. 1007, 314 Mo. 33.

The Legislature has specifically provided the sum of \$5,000.00 for personal services for the biennial period beginning July 1, 1949, and ending June 30, 1951.

We have checked the appropriation acts of the Legislature since the creation of the Missouri State Soil Districts Commission. We have been unable to find in any of such acts the creation of a revolving fund for the use of the Commission.

Conclusion

In view of the above statutory and constitutional provisions, it is the opinion of this department that the Missouri State Soil Districts Commission:

- (1) Does not have authority to sell its motor vehicles but must have the state purchasing agent sell them for and on behalf of said Commission;
- (2) That the Commission cannot retain the money received from the sale of such vehicles, as the money must be deposited in the state treasury;
- (3) That the Commission cannot spend in excess of the amount appropriated by the 65th General Assembly for personal services (\$5,000.00) for the biennial period ending June 30, 1951.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS:

VACANCY AFTER NOMINATION:

When a vacancy in office occurs after any primary and before the general election, such vacancy shall be filled by nomination by the party committee of the proper county, district or state, according to the office to be filled, and such nomination shall be certified to by the chairman or secretary of the party committee.

October 10, 1950



Honorable Harold L. Miller
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Sir:

You have requested an official opinion by this department upon the following statement of facts:

"With reference to your September 22nd, letter, I felt that after I had sent my letter out that I had not sufficiently explained the situation.

"A was nominated for office, and on August 30th, withdrew as a Candidate for the office, (being a county office); on September 20, a declaration of candidacy was filed on behalf of B, signed B by C. C is the Secretary of the County Central Committee, however, the declaration did not disclose such fact. It is not known whether or not the vacancy was filled by any action of the Central Committee or not, since no certificate or certification to such effect was filed with the County Clerk."

The Laws of 1941, page 354, Section 11539, which will be Section 120.75, R. S. Mo. 1949, provides as follows:

"The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between conventions of the party. That for the purpose of making nominations to fill vacancies resulting from death or resignation and not otherwise, on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. That a central committee shall not have the power to delegate

Honorable Harold L. Miller

its authority to make nominations to any person or number of persons, and that any act consequent upon any such delegation of authority shall be held to be null and void. That no central committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted."

Section 11539, Laws Mo. 1941, page 365, was repealed by the 65th General Assembly by the enactment of House Revision Bill 2057. Said House Revision Bill 2057 provides the following sections that relate to the problem presented by you.

Section 120.08

"All certificates of nomination which are in apparent conformity with the provisions of sections 11539 and 11540, shall be deemed to be valid unless objection thereto shall be duly made in writing within three days after the filing of the certificate. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination. Objections to use of a party name may also be made and passed upon in the same manner as objections to certificates. The secretary of state or the county clerk, as the case may be, with whom the original certificate was filed, shall in the first instance pass upon the validity of such objection. His decision shall be final unless an order shall be made in the matter by the supreme court, or a circuit court, or by a judge of such court in vacation, before the date for the certification of the names of nominees by the secretary of state to the county clerk, or before the time at which the county clerk is required by law to publish the names of nominees as certified to him. Such order may be made summarily upon application of any party interested and upon such notice as the court or judge may require. The decision of the secretary of state, county clerk or the order of the court or judge thereof in vacation shall be binding on all county and municipal officers with whom certificates of nomination are filed. In all cities having a board of election

Honorable Harold L. Miller

commissioners, the board shall perform all the duties herein required of county clerks and be governed in all respects by the provisions of sections 11539 and 11540, the same as county clerks are governed by such provisions."

Section 120.13

"No person shall (1) falsely make or fraudulently destroy any certificate of nomination or any part thereof; (2) file any certificate of nomination, knowing the same or any part thereof to be falsely made or (3) suppress any certificate of nomination, or any part thereof, which has been duly filed. Every person violating any of the provisions of this section shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the Penitentiary for a period of not to exceed two years, or by imprisonment in the County Jail for a period not to exceed one year."

Section 120.55

"When a vacancy, occurring in the nominations after the holding of any primary, has resulted from the death or resignation of a nominee of the party who was selected at such primary or when a vacancy in office occurs after the last Tuesday in April and before the general election held in the same year which vacancy is to be filled for the unexpired term at such general election, the party committee of the county, district or state, as the case may be, shall have authority to make nominations to fill such vacancies. Nominations to fill such vacancies shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination or with the board of election commissioners or county clerk not later than ten days before such election. No names shall be allowed on any ticket until the required fee has been paid."

The election laws of Missouri do not prescribe the form in which the certificate of nomination shall be made by the party committee. Therefore the form of the certificate of nomination may be worded in any manner to inform the person with whom it is filed of the facts required by law to be given by the party committee.

Honorable Harold L. Miller

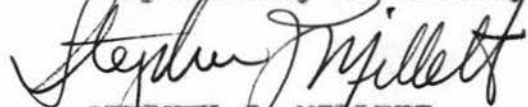
The certificate should state that a majority of all the members elect of the central committee met to fill the vacancy on the party ticket and that John Doe was nominated by the central committee to fill the vacancy resulting from the death or resignation of the nominee of the party who was selected at the primary election. This statement or certificate should be signed by the Chairman of the party central committee or its secretary, or by both the chairman and secretary.

The facts stated in your request show that a declaration of candidacy or the form used for a declaration of candidacy was filed on behalf of B and signed B by C. The fact that C is the secretary of the county central committee would not make the declaration of candidacy serve the purpose of nominating B to fill the vacancy created by the withdrawal of A as a candidate for a county office. C should make a statement that the party central committee met with a majority of members in attendance and that at said meeting the committee nominated B to fill the vacancy on the party ticket created by the resignation or withdrawal of A as a candidate, if such facts have occurred. If the party central committee has not held a meeting to fill the vacancy, then it will be necessary for it to do so.

CONCLUSION

It is the conclusion of this department that the declaration of candidacy filed on behalf of B by another person does not fill the vacancy on the party ticket created by the resignation of A who was nominated at the last primary election. In order to fill the vacancy the county central committee must meet and nominate a person to fill the vacancy on the party ticket for a county office. The action of the central committee must be certified to by the chairman or secretary or both on behalf of the party central committee and filed with the county clerk.

Respectfully submitted,



STEPHEN J. MILLETT

Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

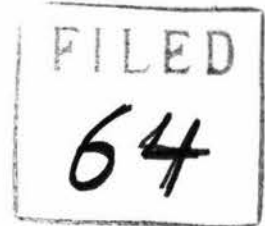
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JUDGMENTS:

The recording, docketing and indexing of a judgment is constructive notice to all parties in interest of the contents and effect of the judgment.

February 21, 1950

Honorable M. E. Morris
State Treasurer
State Capitol Building
Jefferson City, Missouri



Attention: Honorable Haskell Holman

Dear Mr. Morris:

This is in response to the request of Mr. Haskell Holman for an opinion whether your office should be directly notified and if so, by whom, of the recent decision of the Supreme Court of this State, in the case of New Franklin School District #28, et al., Respondents, vs. G. H. Bates, Director of Revenue, et al., Appellants, appealed from the Circuit Court of Cole County, Missouri, before complying with the decision, directing the State Treasurer to set aside and place in the State Public School Moneys Fund twenty-five per cent of the fines assessed by the Supreme Court against respondents in the case of State ex inf. Taylor, Attorney General vs. American Insurance Company, et al.

Your letter is as follows:

"It has generally come to our attention that the Supreme Court of Missouri has recently rendered a decision in reference to the case of State ex inf. Taylor, Attorney General v. American Insurance Company, et al., 200 S.W. (2d) 1, in which decision the Court held that the fund derived from the fines and penalties assessed against the respondent insurance companies in said case was State revenue, and directing the State Treasurer, under Section 3, Article IX of the Constitution of Missouri, 1945, be required to set aside and place in the State Public School Moneys Fund 25% of said fund.

Honorable M. E. Morris

"There arises the question whether the State Treasurer should be directly notified, and if so by whom, of the decision before undertaking to so set aside that part of the said fund.

"Will you please give us your opinion on this question?"

The original defendants in the cause No. 41308 in the Supreme Court were Mount Etna Morris, Director of Revenue, B.H. Howard, Comptroller, Forrest Smith, State Auditor and Robert W. Winn, State Treasurer. During the pendency of said case in the Supreme Court and before September 19, 1945, the above defendants had resigned their offices, or their terms of office had expired, and the following defendants, as their respective successors in office were, by stipulation, substituted for them and were made parties defendants in said cause, to-wit: G.H. Bates, Director of Revenue, Elmer Pigg, Comptroller, W.H. Holmes, State Auditor and Mount Etna Morris, State Treasurer. Thus in your present official position you were a party to the suit at the time of the final judgment.

In asking if you should be directly notified of the decision of the Supreme Court, we understand you to inquire if you should be personally served with a written notice or a copy of the decree of the Supreme Court, or a copy of the judgment of the trial court, upon remand of the case, by some officer or person authorized to actually deliver such written notice to you, and if so, what officer should serve such notice.

The Supreme Court held in the decision that the fund in question is "state revenue" and that under Section 3(b) of Article IX of the Constitution of Missouri, 1945, twenty-five per cent of the fund is required to be set aside and placed to the credit of the public school fund.

The mandate from the Supreme Court, we are advised by the Circuit Clerk, was received by his office on January 28, 1950, and thereupon the Circuit Court of Cole County made its record entry of judgment in conformity with the decree of the Supreme Court.

Parties to an action are presumed, for their own information, to keep in touch with the proceedings in the trial court and the appellate court and, in case of a reversal of the cause, as was the case here, with the orders and judgments thereupon made by the trial court in conformity with the opinion of the appellate court. But whether they do so or not, the parties have constructive notice of the contents and effect of the judgment by the record itself, which consists of entering the judgment, docketing and indexing

Honorable M. E. Morris

as to book and page. Notice has been said by textwriters and the Courts to be equivalent to information, and may be synonymous therewith. (Jackson Co. ex rel. Farley vs. Schmid, et al., 141 Mo. App. 229, 46 C.J. 538). 46 C.J., pages 541 and 542, defines direct and indirect notice as follows:

"'Direct notice' has been defined as that kind of actual notice which consists of direct information of a fact brought home to a party; and 'indirect notice' as that kind of actual notice which consists of any knowledge of circumstances leading to knowledge of such facts."

The entering of judgment by the Circuit Court of Cole County, in compliance with the decree of the Supreme Court, on January 28, 1950, became the final judgment in the case. In this character of case our statutes do not provide that a party to the suit is entitled to direct actual notice of the rendition of the judgment. The St. Louis Court of Appeals in the case of Inter-River Drainage District of Missouri vs. Henson, et al., 99 S.W. (2d) 865, in defining the effect and extent of a judgment as constituting constructive notice, l.c. 873, said:

"* * * The recording of a judgment, properly entered and docketed, is notice of what it contains or recites, as well as such facts as might be fairly inferred from its recital, and such record carries with it constructive notice of the facts therein expressly recited as well as such facts as might be fairly inferred from its recitals."

There are some classes of cases, such as mandamus, injunction, prohibition and perhaps others, where a party to a suit, or an administrative officer, or a judicial officer, who is commanded to perform certain acts in a certain way, would be entitled to a copy of the judgment as actual notice of the judgment or order so requiring such performance. But the case in consideration was not one of such classes. It was a suit for declaratory judgment, and no such notice is required to be given the parties, nor is it due them. The record entry of the Circuit Court of Cole County, entered as aforesaid, on the date aforesaid, complying with the decree of the Supreme Court in the cause, constitutes constructive notice and information for all persons and officials in interest of the terms and effect of the judgment and is the only notice the State Treasurer should have to enforce the terms of the judgment by setting aside, twenty-five per cent of the fund, as by the Court

Honorable M. E. Morris

directed, for the benefit of the public schools. You were authorized to proceed therein at any time after the Circuit Court of Cole County so made its record on January 28, 1950, without direct personal notice being given you. It follows that, since no direct personal notice of the recording of the judgment to the parties in the case is required, there is no person, official or otherwise, who could be authorized to give a notice in such cases.

CONCLUSION

It is, therefore, the opinion of this Department that:

1) It is not required that the State Treasurer be given direct personal notice of the entering of the judgment by the Circuit Court of Cole County in the named case.

2) That the entering of the judgment, docketing and indexing the judgment as to book and page where recorded constitutes constructive notice to all the parties in interest in the cause of the contents and effect of the judgment, and that such record is sufficient notice to the State Treasurer upon which he was authorized after the entering of the judgment of record to proceed to execute the terms of the judgment.

3) That because direct personal notice is not required to be given to the State Treasurer in the premises, there is no authority, by statute or otherwise, for any person or official to give notice to the parties to the cause.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WORKMEN'S COMPENSATION:

DUTIES OF STATE TREASURER:

The duties of the State Treasurer defined in Section 3707(a), Laws of Missouri, 1945, page 1998, amending the Workmen's Compensation Act, are related to the receipt, custody and disbursement of State funds. Said Section 3707(a) is constitutional.

April 23, 1950

5/1/50



Honorable M. W. Morris
State Treasurer
Custodian of the Second Injury Fund
Jefferson City, Missouri

Dear Mr. Morris:

This is in response to your recent letter requesting further clarification of the opinion of this Department dated November 21, 1949, respecting the duties of the State Treasurer as custodian of the Second Injury Fund under the Workmen's Compensation Act, in view of the last sentence of Section 15, Article IV of the Constitution of this State, 1945, which sentence states the following:

"No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

Your letter requesting our further opinion on the subject states:

"With further reference to your opinion, dated November 21, 1949, in connection with the duties of the State Treasurer as custodian of the Second Injury Fund under the Workmen's Compensation Act, it would appear that this fund must be segregated from the moneys of the State Treasury in order that such moneys may be disbursed by the State Treasurer in the absence of warrants from the Comptroller and Auditor.

"The opinion holds that this fund is not state money. The question arises in my mind whether or not it is proper for the

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State Treasurer to have any connection with it. This is in view of the last part of Section 15, Article 4 of the Constitution of Missouri, 1945, which reads:

"No duty shall be imposed on the State Treasurer by law which is not related to the receipt, custody and disbursement of state funds."

The complete text of Section 15 states:

"All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. Such institutions shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits on demand of the state treasurer authorized by warrants of the state auditor. No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

Your question is whether, in view of the language of the last sentence of said Section 15, that part of said Section 3707(a) enacted in 1943, (Laws of Missouri, 1943, page 1068, as amended, Laws of Missouri, 1945, page 1998), designating the State Treasurer custodian of the Second Injury Fund and prescribing his duties thereunder has become inoperative as being in conflict with Section 15, Article IV of the 1945 Constitution, particularly the last sentence of the section.

The Legislature has the power to fix, change, increase or diminish the duties of any public officer unless

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prohibited from so doing by constitutional provision. Regarding such power 46 C.J. 1036, states the following text:

"* * * An officer accepting office does so subject to the possibility that his duties may be increased or diminished, and in the absence of constitutional restrictions the legislature may do so at its pleasure. Thus the Legislature may, from time to time, change the duties of offices created by itself. The legislature, moreover, may, within reasonable limits, increase or abridge the duties of a constitutional office, but they cannot be so changed as to destroy the powers of the office or essentially to alter it."

The Second Injury Fund itself, as said in our opinion of November 21, 1949, is a special fund. Notwithstanding, however, that the fund is a special fund, the duties of the State Treasurer as custodian of the fund are, we believe, not only "related to the receipt, custody and disbursement of state funds," but were and are necessary elements in the receipt, custody and disbursement of public funds appropriated and used from the beginning for the creation and administration of the entire Workmen's Compensation Act. The word "related" is defined in Webster's New International Dictionary, Second Edition, page 2102, in definition 2 as "having relationship, as to or with something expressed or implied or with each other; connected by reason of an established or discoverable relation; as, a closely related subject; * * * ."

Beginning in 1927 with the first session of the Legislature after the adoption of the Act under the initiative, (Laws of Missouri, 1927, pages 25, 35 and 54) down to and including the Session of the 63rd General Assembly in 1945, (Laws of Missouri, 1945, pages 212, 329 and 330), and including also the 64th General Assembly (Laws of Missouri, 1947, page 76, Section 4.280) the Legislature at each session thereof has appropriated from the General Revenue Fund state funds for salaries, supplies, equipment and maintenance of the Workmen's Compensation Commission and the administration of the Act itself, including the carrying out of the terms of said Section 3707(a) which created the Second Injury Fund and

Honorable M. E. Morris

named the State Treasurer custodian of the fund and defined his duties as such custodian.

At the Session of 1927 the Legislature loaned out of the General Revenue Fund to the Workmen's Compensation Commission the sum of Twenty-Five Thousand (\$25,000.00) Dollars, (Section 23a, page 35), in addition to the other appropriations on pages 25 and 54 of said Session Acts (Laws of Missouri, 1927, pages 25, 35 and 54).

One of the appropriations made by the Legislature in 1945 (Section 36a, Laws of Missouri, 1945, page 330) was for the sum of Twenty-Five Thousand (\$25,000.00) Dollars for the benefit of the Second Injury Fund.

The appropriations of state funds noted were for the actual operation of the Workmen's Compensation Act, both as to the general and effective enforcement of the Act and on behalf of the later amendment--Section 3707--creating the Second Injury Fund, and the provisions for its custody by the State Treasurer and its use in the payment of compensation under the Act.

These public funds were used and disbursed for the payment of salaries of the officers designated by law to carry out the terms of the Act, and for equipment, such as printing and office furnishings, and such other uses as the Commission would find necessary in its work, and for the payment of salaries and wages to employees of the Commission for the performance of their duties, including the putting into active operation the Second Injury Fund amendment as a part of the Act. Such appropriations of state funds and their use in behalf of the administration of the Workmen's Compensation Act make workmen's compensation, including the operation of the Second Injury Fund amendment, the collection of the money required to be paid into the fund, the payment of compensation out of the fund and the duties of the State Treasurer as custodian of the fund as defined in said Section 3707(a) are kindred subjects with and all of them are connected with and are thusly "related to the receipt, custody and disbursement of state funds."

The provisions of Section 3693 of the Compensation Act authorize the public bodies such as the state, counties, municipal corporations, townships and school districts named in the first paragraph of said Section 3693 to elect,

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under the fifth paragraph of said section, to bring themselves within the provisions of the Workmen's Compensation Chapter. Upon the acceptance of the Act such public entities are authorized to use public funds for the payment of compensation to their employees who may be injured in the performance of duties beneficial to the public. By such acceptance of the provisions of Chapter 29, and particularly under the provisions of said Section 3707(a), every such public body, as an employer, must pay into the Second Injury Fund for every fatal injury by accident to an employee, on account of which death benefits would be payable under Chapter 29, but sustained by an employee having no dependents, as defined by Section 3709, R.S. Mo. 1939, a lump sum of Five Hundred (\$500.00) Dollars, in addition to the amount provided for burial and the expenses of the employee's last illness. Such employer shall pay into the Second Injury Fund in case of the total, permanent loss of the use of an eye, a foot, a leg, an arm or a hand, in addition to the compensation as provided for in the Act, the sum of One Hundred (\$100.00) Dollars for the total, permanent loss of the use of any such member. Such payments would, of course, be made with and out of public funds. These provisions not only create a relationship between the Second Injury Fund and public funds, or state funds, as named in said Section 15 of Article IV of the Constitution, but therein and thereby by mandatory, statutory directions in Section 3707(a) such employers are compelled to participate actively in paying contributions to and for the maintenance of the Second Injury Fund out of public or state funds.

The present Constitution itself, in Section 30 of Article IV authorizes the State Highway Department to set apart from its funds and income a sufficient sum thereof to pay for any workmen's compensation. Said Section 30 of Article IV of the new Constitution was not self-enforcing. The authority granted in said Section for the Highway Commission to set apart and use its funds for compensation purposes required legislative action to make such provisions operative. The Legislature has provided a plan for the Highway Department to follow in carrying out the authority given it by said Section 30 to set aside from its funds a necessary amount to pay for compensation, by enacting Senate Committee Substitute for House Bill No. 50, Laws of Missouri, 1945, pages 2004 and 2005, which is an Act to amend Article 13 of Chapter 46, R.S. Mo. 1939. This article and chapter constitute the Highway Department and State Highway System Laws of Missouri. The amendment

Honorable M. M. Morris

added to said article and chapter two new sections to be known as Sections 8752a and 8752b, authorizing the State Highway Commission to accept the provisions of the Workmen's Compensation Act--Chapter 29, R.S. Mo. 1939--and to pay compensation on account of injury or death to its employees primarily engaged in highway maintenance and construction work, and for uniformed members of the State Highway Patrol. Said Section 8752a provides that the amending Act is designed to extend the provisions of the Workmen's Compensation Act, Chapter 29, R.S. Mo. 1939, and amendments thereto, to include the employees of the State Highway Commission and the employees of the State Highway Patrol. The Highway Department would be, by the authority given to it by said Section 30 and under the terms of said 1945 enabling Act, required to use state funds to pay compensation and would be under the same obligation and mandatory duty to pay such sums into the Second Injury Fund by the terms of said Section 3707a out of state or public funds upon the happening of such casualties as are therein described, as are likewise required of other public bodies electing to accept the provisions of the Compensation Act under said Section 3693.

The Supreme Court of this State in the case of State ex rel. McKinley vs. Hackmann, 282 S.W. 1007, a case in which State Highway funds were involved, defined state revenue, or, as the last sentence in said Section 15, Article IV of the present Constitution states it, "state funds". The Court in the Hackmann case, l.c. 1011, quoted from the Northeast Missouri Teachers' College case, 264 S.W., l.c. 700, and in adopting its definition of state revenue, holding that money out of which the Highway Commission is to be maintained is as much public or state revenue as any money coming into the State Treasury from any source said:

"By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money."

"It thus appears that not only is the fund public revenue or state money, but it is public

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revenue of a very extraordinary kind, levied, collected, and held by the state for two specific public uses, the major use of which is the payment and retirement of state bonds. * * * ."

The escheat fund of this State, in its creation and administration, and the duties of the State Treasurer respecting that fund, are very similar in many respects to the State Treasurer's duties as custodian of the Second Injury Fund.

The framers of the Constitution and people voting upon the draft knew that the Second Injury Fund statute, 3707a, enacted in 1943, (Laws of Missouri, 1943, page 1068 as amended, Laws of Missouri, 1945, page 1998), and the escheat statutes were in full force and effect when Section 15 was included in the draft of the Constitution and was adopted. It is not to be presumed that the framers of the document, or the people intended to nullify or, by implication, provide for the repeal of either the Second Injury Fund amendment to the Compensation Act or any of the escheat statutes contained in said Article 3. It is plain, we believe, that it was the intention of the framers that the duties of the State Treasurer as Custodian of the Second Injury Fund should not be prohibited by the terms of said last sentence in said Section 15 of Article IV, because such duties were then and now are necessarily and immediately connected with and "related to the receipt, custody and disbursement of state funds."

CONCLUSION.

It is, therefore, the opinion of this Department in consideration of the above related conditions, facts and authorities, that the duties of the State Treasurer as Custodian of the Second Injury Fund of the Workmen's Compensation Act of this State, Laws of Missouri, 1945, page 1998, are related to the receipt, custody and disbursement of state funds of this State, and are not prohibited by the last sentence of Section 15 of Article IV of the Constitution of Missouri, which reads: "No duty shall be imposed on the state treasurer by law which is not related to the receipt, custody and disbursement of state funds."

Respectfully submitted,

APPROVED:

J. L. FAYLOR
Attorney General

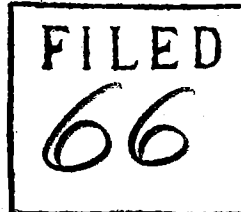
GEORGE W. CROWLEY
Assistant Attorney General

GEC:ir

ADOPTION) Juvenile court of county in which persons seeking
) to adopt reside or in which child sought to be
JUVENILE COURTS) adopted may be has jurisdiction in adoption proceedings.

April 29, 1950

Honorable James F. Nangle
Judge of the Juvenile Court
of Saint Louis
1321 Clark Avenue
St. Louis, Missouri



Dear Sir:

We have received your request for an opinion of this department,
which request is as follows:

"Some confusion has developed concerning the matter of jurisdiction between the Saint Louis County Court and this Court in adoption proceedings. According to the new adoption law, which went into effect May 21, 1948, and more particularly Section 9619, a child shall not be transferred to an individual, or an agency, without first obtaining an order from the Judge of the Juvenile Court.

"When the transfer of custody is granted in this Court, the prospective adopting parents must wait nine (9) months before the adoption petition is heard. There have been instances where the prospective adopting parents have left the City of Saint Louis after receiving the transfer of custody and established a home in Saint Louis County before the expiration of the nine (9) months period as prescribed by the adoption law. Also, there are situations when an agency having custody of the child from this Court has placed such child in a Saint Louis County home with a view toward adoption. Since such individuals are then in another County, some attorneys believe they should initiate adoption proceedings in the Saint Louis County Court.

Honorable James F. Nangle

"It is my opinion, and that of several judges who have preceded me on the Juvenile bench, that if jurisdiction is taken by this Court in the matter of transfer of custody that the Saint Louis Juvenile Court retains jurisdiction under Section 9673, Revised Statutes of Missouri 1939, and that the petition for adoption must be filed in this Court. I believe, and they concur, that jurisdiction remains here until removed by a Court of higher jurisdiction, but not by a Court of concurrent jurisdiction.

"It is my understanding that the Judges in Saint Louis County believe they have the right to hear the petition and grant a decree of adoption in such cases although the transfer of custody to the parents, or agency, was heard and granted in the Saint Louis Juvenile Court, and has remained in this Court.

"I am vitally interested in having your assurance that the decree of adoption which I grant is not subject to question at any future date as to matters of jurisdiction. I am very anxious to have your opinion on this matter, because such situations are arising here repeatedly."

Section 9608, Laws of Missouri, 1947, Volume II, page 213, provides in part as follows:

"Any person desiring to adopt another person as his child may petition the Juvenile Division of the Circuit Court of the County in which the person seeking to adopt resides, or in which the person sought to be adopted may be, for permission to adopt such person as his child."

Section 9608 formerly provided that the petition should be filed in the county where the person proposed to be adopted resided, or, if such person had no place of abode in this state, then in the county in which the person seeking to adopt resided.

The rule regarding jurisdiction in matters of adoption is stated in 2 C.J.S., Adoption of Children, Section 35, page 416, as follows:

"In view of the fact that adoption statutes are in derogation of the common law, and that

Honorable James F. Nangle

courts vested with the power to hear and determine adoption proceedings in so acting are courts of limited jurisdiction, a statute requiring the residence of the parties within the jurisdiction of the court granting the adoption is mandatory, * * *

The courts of this state have not definitely passed on the question of whether or not provisions prescribing the place in which petitions in adoption proceedings must be filed are mandatory. In the case of *In Re Duren*, 355 Mo. 1222, 200 S.W. (2d) 343, 1. c. 350, the court stated:

"There is considerable authority to the effect that if a statute requires an adoption suit to be brought in the county of the adoptee's residence, it is a condition precedent to a valid adoption. * * *

The court then proceeded to consider at length the question of the residence of the child sought to be adopted. It held in that case that the requirements of the statute had been complied with.

The present statute (Section 9608, supra) has eliminated the necessity of residence within the county where the petition is filed of the child sought to be adopted. All that is now required is that the child be in the county where the petition is filed. Residence on the part of the person seeking to adopt is still necessary if the jurisdiction is to be based upon their status.

As you point out, Section 9613, Laws of 1947, Volume II, page 213, requires that the person sought to be adopted have been in the custody of the petitioners for at least nine months prior to the adoption decree. Section 9616, provides in part:

"No person, agency, organization or institution shall surrender custody of a minor child, or transfer the custody of such child to another, and no person, agency, organization or institution shall take possession or charge of a minor child so transferred, without first having filed a petition before the Circuit Court sitting as a Juvenile Court of the County where the child may be, praying that such surrender or transfer may be made, and having obtained such an order from such Court approving or ordering transfer of custody. * * *

Honorable James F. Nangle

No provision is made that a court which has transferred custody of a child shall thereafter retain control of such child in all matters, including his adoption.

In view of the foregoing, we feel that in the situations presented by you, where custody is granted by you, and thereafter a petition for adoption is filed, the petition should be filed in either the county in which the persons seeking to adopt reside or in the county where the child may be. If the persons seeking to adopt reside in St. Louis County, and the child is also there, the St. Louis County Circuit Court is the proper place for filing of the petition for adoption. The fact that both the parents and the child removed to the county following the order of your court granting custody of the child does not appear to affect the question of jurisdiction for purposes of adoption. In some cases the petition for adoption might be filed in your court and the persons thereafter removed to St. Louis County. Inasmuch as your court had jurisdiction at the time of the filing of the petition, we feel that it would have jurisdiction to enter the decree of adoption.

We do not feel that Section 9673, R. S. Missouri, 1939, affects the question of jurisdiction in adoption proceedings. That section, which is found in Article 9 of Chapter 56 dealing with juvenile courts in counties with 50,000 inhabitants and over, provides in part that:

"When jurisdiction has been acquired under the provisions hereof, over the person of a child, such jurisdiction shall continue for the purpose of this article until the child shall have obtained its majority."

(Underscoring ours.)

Article 9, for the purpose of which the court retains jurisdiction, deals with the treatment of neglected and delinquent children and does not relate to the matter of adoption. Therefore, we feel that this provision is not relevant in the matter of jurisdiction in adoption proceedings.

CONCLUSION

Therefore, it is the opinion of this department that under Section

Honorable James F. Nangle

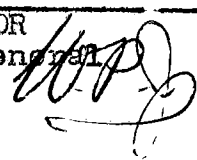
9608, Laws of Missouri, 1947, Volume II, page 213, an adoption petition is required to be filed in the county in which the persons seeking to adopt reside, or in which the person sought to be adopted may be, and the fact that a Juvenile Court has ordered the transfer of custody of the child sought to be adopted in accordance with Section 9616, Laws of Missouri, 1947, Volume II, page 213, does not confer jurisdiction upon said court in the absence of compliance with the requirements of Section 9608.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General



RRW/feh

TAXATION:

Property acquired by taxation-exempt organization after assessment date liable for the taxes for year in which acquired.

May 31, 1950

OPINION NO. 66

Honorable O. R. Newcomer
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The County Assessor of Buchanan County, on January 1, 1949, assessed the value of a certain parcel of real estate in St. Joseph, Missouri, for the year 1949, at \$4,050.00. At the prevailing rate, the tax amounted to \$101.25 for the year 1949. On or about June 1, 1949, the property in question was purchased by the Wyatt Park Baptist Church, and has been used since that date as a parsonage. When the property was sold the seller agreed to pay 5/12 of the tax of \$101.25, and a proper allowance was made in the purchase price of the property to cover this amount. While the Wyatt Park Baptist Church, is willing to pay this amount as taxes for 1949, it takes the position that since this property became exempt from taxation on June 1, 1949, under the Constitution and General Laws, of this State, no tax on this property may be collected after it came into the possession of the Wyatt Park Baptist Church.

"I would appreciate receiving at your convenience an expression of your views regarding this matter."

Honorable O. R. Newcomer

The case of St. Louis Provident Association v. Gruner, 355 Mo. 1030, 199 S.W.2d 409, involved a situation very similar to that presented by you. In that case the plaintiff, a charitable organization, had acquired certain real property on February 26, 1944. The tax date at that time was June 1. The question was whether or not the lien for taxes attached on June 1 of 1943 so that the plaintiff was liable for the taxes due in 1944. The court held that the plaintiff was liable for the taxes. Its conclusion was stated as follows at 199 S.W.2d l.c. 411:

" * * * Our conclusion is that the state had at least an inchoate lien from June 1, 1943 for taxes due on this land in 1944 which became fixed in amount by relation back to that date after the assessment and levy was completed. For discussion of this rule of relation back, see 61 C.J. 924, Section 1175 and cases cited. It may be noted that the rate of the state tax had been fixed prior to the assessment date by Section 11039, and that the rate of the blind pension tax had been so fixed by Section 9461. See also Laws 1943, p. 1066, Mo. R.S.A. Section 11039a. Of course, if the state's lien for the entire tax due in 1944 attached as of June 1, 1943, there can be no proration of the tax. We, therefore, hold that plaintiff has no exemption from the taxes due in 1944 on the land involved nor any part thereof."

The tax date was changed by an act found in Laws of Missouri, 1945, page 1799, to January 1. Section 7 of that act, relating to the state's lien for taxes, provided in part as follows:

" * * * real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the state in all real property for all taxes thereon, which lien shall accrue and become a fixed encumbrance as soon as the amount of the taxes is determined by assessment and levy, and said lien shall be enforced as hereafter provided in this chapter; said lien shall continue to be enforced until all taxes, forfeitures, back taxes and costs shall be fully paid or the land sold or released as provided in this chapter." (Underscoring ours.)

Honorable O. R. Newcomer

The underscored portion is a change from the provision of Section 10941, R.S. Missouri, 1939, which was in effect at the time of the decision in the St. Louis Provident Association case, supra. However, it has been held that this change does not affect the time at which the lien for taxes attaches. The lien has been held to continue to attach as of the assessment date or January 1. In the case of United States v. Certain Land Situate in City of St. Louis, 86 Fed. Supp. 297, the United States District Court for the Eastern District of Missouri concluded as follows at l.c. 302:

" * * * When we consider the Missouri decisions dealing with tax liens; the definitions of the words 'accrue' and 'fixed'; together with Secs. 4 and 7, pp. 1800-1801, and 7, p. 1861, of the Missouri Laws of 1945, emphasis is added to the belief that the legislature meant by the new sections that an inchoate lien for taxes commenced on January 1, 1946, for 1946 taxes, and that said lien was a present enforceable demand which, under the new clause, became a fixed or settled lien in amount when the assessment and levies were determined."

In view of this holding, we feel that the conclusion of the Supreme Court in the St. Louis Provident Association case is applicable here, and the property is subject to a lien for taxes for the year 1949.

CONCLUSION

Therefore, it is the opinion of this department that when real estate is acquired by a tax-exempt organization after the assessment date, or January 1, the property remains subject to a lien for taxes for the year in which it was acquired by the tax-exempt organization.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS-ABSENTEE BALLOT:

Any officer authorized by law to administer oaths may take the affidavit of a voter of an absentee ballot and make the certificate required by Sec. 11473, but such officer is prohibited from soliciting the voter to vote for or against any candidate or proposition while such voter is before him.

July 13, 1950

Honorable Ralph B. Nevins
Prosecuting Attorney
Hickory County
Hermitage, Missouri



Dear Mr. Nevins:

This is in reply to your letter of June 26, 1950, requesting our opinion construing the terms of Section 11473, R.S. Mo. 1939, under the title of "Elections" on the question whether a candidate for a county office who had previously solicited a voter to support his candidacy would thereby be disqualified from taking the affidavit of the voter and making the certificate required by Section 11473. Your letter is as follows:

"I would appreciate an opinion on the following:

"Would the fact that one is a candidate for county office and had solicited an absentee voter some time previous to the date on which the absentee executes the oath on the official absentee ballot envelope, disqualify the person giving the oath and signing the certificate?

"I have reference to the part of the certificate which reads as follows:

"'and that the affiant was not solicited or advised by me to vote for or against any candidate or proposition'."

Section 11473, Laws of Missouri, 1949, page _____, House Bill No. 5, is our present section of Article I, Chapter 76, R.S. Mo. 1939, under the title of "Elections". The absentee ballot law was first incorporated into our election laws, applicable only to general elections for public office, in 1913, Laws of Missouri, 1913, page 324. The Act was amended later to include primary elections, and now includes also elections on governmental propositions. The question submitted in your letter could arise only, we believe, when a voter, expecting to be absent from his precinct and county on the day of the election at which he desires to vote, appears and makes the affidavit required by said Section 11473, receives his absentee ballot, prepares and marks his ballot in the presence of an officer authorized by law to administer oaths, and no other person, but in such manner that such officer will not know how it is marked, then deposits it in the envelope as required by Section 11473 and securely seals the envelope, as provided in Section 11474, Laws of Missouri, 1949, page _____, House Bill No. 5, and thereupon the officer writes or prints upon the envelope the statement that the absentee ballot of the named voter is marked and sealed in the envelope in his presence, and the certificate required by said Section 11473 is then signed by the said officer and his official title noted thereon, and the ballot is then delivered in person to the issuing official who shall give his written receipt therefor.

The Act of 1913 provided that the absentee voter should present himself on election day at any general election at any voting precinct in this State, and, under the conditions prescribed in the Act, cast his ballot. Section 2 of that Act required that the voter make affidavit before one of the judges of such election identifying himself as a qualified elector in his named precinct and ward and county or the City of St. Louis and state therein that he was required to be absent from his said precinct on election day and that he had not voted nor would he vote elsewhere at said election. This was the then complete procedure to vote an absentee ballot.

This section was carried over without change or amendment in the Revision of 1919 as Section 4752, and in

the Revision of 1929 as Section 10182. There was no change made in this statute by the General Assembly in 1931. The Legislature of 1933, Laws of Missouri, 1933, page 218, repealed Section 10181 to Section 10188, both inclusive, of Chapter 61, R.S. Mo. 1929, relating to elections, and re-enacted in lieu thereof, a like number of new sections, numbered as were the repealed sections, and four additional new sections numbered 10188a, b, c, and d, respectively. Section 10184 of the 1933 Act, pages 221, 222, contained the first provision requiring a statement in the jurat and certificate of the officer taking the affidavit set forth on the reverse side of the envelope containing the absentee voter's ballot, certifying that "the affiant was not solicited or advised by me to vote for or against any candidate or proposition". Section 11473, R.S. Mo. 1939, was included without change, so far as the jurat and the certificate were concerned, in the amendment of Article 2, Chapter 76, Laws of Missouri, 1943, page 526, l.c. 528, 529. The section was amended in some particulars, but not as to the clerk's certificate, Laws of Missouri, 1944, Extra Session, page 18, l.c. 20. This provision is retained intact in the latest expression of the Legislature on this question, Laws of Missouri, 1949, page _____, House Bill No. 5.

We have a constitutional provision that voters shall have and enjoy the free exercise of the privilege of suffrage. This would mean the free, uninterrupted and uninfluenced right of the voter to cast his ballot at a lawful election, subject only to his obedience to the statutes regulating such elections and his eligibility as an elector at such elections. The statutes of this State provide penalties for the violation of election laws by officials required by law to perform duties incident to, and before, during, and after any election. Penalties are also prescribed for violation of election laws by the voter himself or those who would seek to corrupt his ballot or intimidate him or prevent in any manner the free exercise of his right of suffrage. But there is no statute in this State, nor has there ever been, prohibiting or making unlawful or immoral the mere solicitation of an elector's vote by a candidate as such, or by an individual who is not a candidate. The terms of Section 11473, Laws of Missouri, 1949, page _____, House Bill No. 5, as to the certificate, and preventing such solicitation of

the voter's favor, are leveled, we believe, exclusively at the action of the official, as an official, during the period, and is confined exclusively to the period, of time the elector is in the actual process of receiving and marking his ballot and during the time of making the affidavit required by Section 11473. It does not refer to, nor include, we believe, any period of time, nor place, previous to the time the elector may be in the presence of said official for such purposes. It does not, we believe, refer to any period of the past when a candidate for office, as an individual, solicited the suffrage of the voter, and who, by reason of his official status as county clerk, or other officer authorized by law to administer oaths, administers the oath and takes the affidavit of the elector and gives the certificate of negation required by the section.

The language used and the terms and meaning of the provisions contained in the certificate provided for in said Section 11473 plainly indicate, we believe, that the Legislature intended that the bar against a candidate soliciting the elector to vote for or against any candidate or proposition so as to prevent him from taking the affidavit of the voter should apply, and does now apply, only to the period and conditions arising exclusively while the elector is making the affidavit and marking his ballot, and that during that period he was not so solicited by the candidate.

The language provided in the certificate makes clear, we believe, the distinction the Legislature had in mind between an individual soliciting votes before an election and an officer performing his official duties when a voter of an absentee ballot appears before him to cast his ballot when this provision was included in the terms of our election statutes.

It was not the intention of the Legislature, we believe, to take away from the individual, although an officer and a candidate, when not in the performance of the official act of taking the affidavit of the absentee ballot voter, the political right to solicit support by the voters of his candidacy for election, or re-election, or on any proposition, merely because he is a candidate and in the

performance of official duties. But when the voter, in casting an absentee ballot, appears before such official, his taking advantage of his official position to further his candidacy or that of any person or to influence the voter for or against any proposition at the expense of the free exercise of the ballot by the voter, is the act we believe the Legislature had in mind and intended to and does prohibit.

CONCLUSION

It is, the opinion of this Department, therefore, that a candidate for public office, and who is an officer authorized by the laws of this State to administer oaths, is not disqualified from administering the oath to an absentee ballot voter or making the certificate required by Section 11473, Laws of Missouri, 1949, page _____, House Bill No. 5, that "the affiant was not solicited or advised by me to vote for or against any candidate or proposition", for the reason that the said candidate had in the past and previous to the time the absentee ballot voter appeared before such officer to receive, and did receive, his absentee ballot, and vote the same in obedience to the terms of said section, solicited such absentee voter to vote for such officer as a candidate for public office, but who, as such officer, while the voter of such absentee ballot was before him as an official incident to and during the time such voter marked and voted such ballot as required by said Sections 11473 and 11474, Laws of Missouri, 1949, pages _____, supra, did not solicit or advise such absentee ballot voter to vote for such officer as a candidate, or for or against any candidate or proposition.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

ELECTIONS: Irregularities in application for absentee ballot and failure of county clerk to post list of applicants or of voters does not affect validity of ballot.

August 9, 1950



Honorable Albert D. Nipper
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In this county and some others in this section, and especially where County Clerks are themselves candidates for re-election, certain questions constantly arise regarding the proper and legal manner for absentee voting.

"In some instances it is reported that the County Clerks take applications for ballots to the proposed absentee voter, solicit his vote and take his application and at the same time furnish the ballot and carry it away voted by the person interviewed.

"In some other cases the report is that the County Clerk writes to the proposed absentee and sends him the application and sometimes the ballot, too, the person addressed not having asked for such application himself as provided in RSMo #11472.

"As to listing it is stated that the lists of applicants for ballots are not posted (as required by RSMo #11472) and sometimes when a list is posted the Post Office address is omitted and oftentimes the street address is omitted or else, merely "U.S. Army" or "U.S. Navy" is listed.

"My questions are:

Honorable Albert D. Nipper

"1) In your opinion is it lawful for ballots to be counted when the County Clerk has visited - or someone else has visited - the voter at his home or where he works in St. Louis or elsewhere outside the County and has in this way solicited the application, taken it then and there, and at the same time, has furnished the ballot, and upon it being voted has accepted it and has either carried it back to the original county or has himself (Clerk) taken it and mailed it back to his own office as if though the voter has done the mailing?

"2) In your opinion is it lawful for ballots to be counted when the list of applicants therefor has never been posted, as required by RSMo #11472; or,

"(a) where a list is posted, can a ballot be counted when the applicant's name has been omitted from that list; or

"(b) where the applicant's name is on the list but his Post Office Address is not given; or

"(c) where the applicant's street address is not given although his Post Office Address is given, but voter cannot be located by Post Office Address only - as for example, solely an address of "St. Louis" - "Washington, D.C." or "Chicago, Ill."?

"(d) where after the ballots are deposited in the Clerk's hands can they lawfully be counted if there is no list of them posted as required by RSMo #11475; or

"(e) where the name has been omitted from such list can the ballot then be properly counted?"

Honorable Albert D. Nipper

Section 112.03, House Bill No. 2050, Sixty-fifth General Assembly, relating to absentee voting, provides in part as follows:

"Application for such ballot may be made on a blank to be furnished by the county clerk or the board of election commissioners or other officer or officers charged with the duty of furnishing ballots as aforesaid, or may be made in writing by first class mail addressed to such officer or board signed by the said applicant. Immediately upon receipt of such application within the time and in the manner provided, the county clerk of the county, or the board of election commissioners, if any, or other official charged with the duty of furnishing ballots to such applicants, shall make a list of the names of such absent voters whose applications for ballots have been received, and shall cause such list to be immediately posted in a conspicuous place accessible to the public at the entrance of the office of such officer or officers which list shall show also the postoffice address, street address, ward or precinct number given by such applicant. Such list shall be supplemented daily by the addition thereto of the names, addresses, and precinct numbers of those thereafter making application for such ballots as authorized by law: provided, that no county clerk, board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records, or otherwise ascertaining the right of such person to vote at such election shall be required to furnish any ballot or ballots to any person desiring to vote who is not lawfully entitled to vote, and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon

Honorable Albert D. Nipper

receipt of the printed ballots shall send by registered mail postage prepaid, or deliver in person an official ballot or ballots if more than one are to be used and voted at said election to such applicant. * * *"

Section 112.06, House Bill No. 2050, Sixty-fifth General Assembly, provides in part as follows:

"The official or officials charged with the duty of issuing such ballots to absent voters for the district, ward or precinct in which such absent voter resides shall receive the ballot of such absent voter and safely keep and preserve the same unopened in his or their office. At least twenty-four hours before the ballot is opened and canvassed, such official or officials shall make a complete list of the names of the absent voters whose ballots have been received and shall cause the list thereof to be posted in some conspicuous place in his or their office, which list shall also show the precinct in which the absent voter claims to be a resident. Such list shall be open to public inspection. * * *".

No provision is made that an absentee ballot obtained other than in the exact manner prescribed in the above section shall be void, nor is there any provision to the effect that failure to comply with the requirements regarding the listing of the applicants for absentee ballots and the listing of the names of the persons from whom ballots have been received shall effect the validity of the ballots.

Rules for the construction of election laws were laid down by the Supreme Court in the case of Nance v. Kearbey, 251 Mo. 374, l.c. 383. The court in that case stated:

"The very taproot and reason for any election at all among a free people, is that the majority may rule; hence there are two main settled and uniform rules of interpretation, thus:

"First: Election laws must be liberally construed in aid of the right of suffrage.

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[State ex rel. v. Hough, 193 Mo. 1.c. 651; Hale v. Stimson, 198 Mo. 134.] The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. [Stackpole v. Hallahan, 16 Mont. 40.] The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

"Second: The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. [Gass v. Evans, 244 Mo. 1.c. 353; Hehl v. Guion, 155 Mo. 76.] 'Such a construction' (says this court, speaking through BARCLAY, J., in Bowers v. Smith, 111 Mo. 1.c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other. [Wells v. Stanforth (1885), 16 W.B. Div. 245.]' Again (pp. 61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. [Ledbetter v. Hall (1876), 62 Mo. 422.] In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.'"

In view of the absence of any statutory declaration that the irregularities referred to by you are fatal, we feel that under

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the rules above prescribed none of the matters referred to in your opinion request should render invalid an absentee ballot properly marked by a person legally entitled to cast such absentee ballot. If such person is legally entitled to vote, he should not be deprived of such right by reason of the fact that the county clerk has failed to comply with the laws relating to absentee voting.

The foregoing is not intended in any respect to justify or condone the county clerk's failure to comply with the law as written. He is under obligation to perform certain mandatory duties in connection with absentee ballots, and he should comply with the statutory regulations in such regard. However, his failure to do so should not penalize a voter who has done all within his power legally to cast his ballot.

CONCLUSION

Therefore, it is the opinion of this department that an absentee ballot cast by a person legally entitled to vote the same may be counted, although the county clerk might have solicited the application from the voter, taken the application from the voter at his home, and at the same time furnished the ballot, and upon its being voted has accepted it and has either returned it to the original county or has taken it and mailed the same to the clerk's office.

We are further of the opinion that the fact that no list of applicants for absentee ballots has been posted as required by Section 112.03, House Bill No. 2050, Sixty-fifth General Assembly, does not render invalid such voter's ballot, and that such ballot may be counted. We are further of the opinion that such ballot may be counted although a particular applicant's name has been omitted from the list, although his postoffice address is not given, or although his street address is not given. We are further of the opinion that after ballots are deposited in the clerk's hands, they can lawfully be counted, although no list of voters is posted as required by Section 112.06, House Bill No. 2050, Sixty-fifth General Assembly, or where the name of a particular voter has been omitted from such list.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General

ELECTIONS: When two poll books of the same precinct are filed with
COUNTY CLERKS: the county clerk, then the poll book that has been
CANVASSERS OF properly signed by all the judges and clerks of the
VOTES: precinct shall be the poll book accepted by the county
clerk, and the other poll book shall be disregarded.
The fact that the poll book and tally sheets of a voting
precinct show a greater number of votes cast than
ballots issued is of no concern of the county clerk or

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November 27, 1950

his assistants, who constitute the board of canvassers. The county clerk shall issue certificates of election to the respective county candidates having the highest number of votes as soon as the canvassers have mathematically determined the total vote cast for each candidate in the county.

Honorable William B. Norris, Jr.
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

You have requested an official opinion by this department upon the problems presented in your letter. Your letter is as follows:

"Section 11615 of Missouri Revised Statutes Annotated (Reenacted Laws 1945 p886 Sect. 1, directs the County Clerk of each County to select for his assistants one person from each of the two political parties and to examine and cast up the votes given to each candidate and to give to those having the highest number of votes certificates of election. The votes of each of the Precincts of Buchanan County have been examined but certificates of election have not been given to any of the candidates voted for on November 7, 1950, because of errors and discrepancies appearing in the Tally Sheets and Returns of the judges and clerks of Precinct E of the Fourth Ward in St. Joseph, Missouri. The judges and clerks of Precinct E of the Fourth Ward were furnished two books, each of which contained forms for the oath of judges and of clerks of election, Tally Sheets, a form entitled Precinct Returns to the County Clerk and a form of a certificate to be signed by the judges and clerks. An examination of the books mentioned by the County Clerk and his two assistants disclose the following facts:

"(1) The oath of judges of election included in book one, above mentioned

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is executed by all six judges who have also signed the certificate to the effect that the foregoing is a full and accurate return of all votes cast for all candidates at said General Election. Book two indicates that only five judges of election have executed the oath and only four judges have executed the certificate. In the case of each book four clerks took the oath and four clerks executed the certificate.

"(2) The number of votes shown on the Tally Sheet of book one differs from the number of votes shown on the Tally Sheet of book two with respect to each of the sixteen candidates voted for at the election.

"(3) In book one the number of votes for the candidates included in the Precinct Return to the County Clerk agrees in the case of twelve candidates with the number of votes shown in the Tally Sheet of book one. However, the number of votes shown in the return differs from the votes shown on the Tally Sheet of book one with respect to four candidates. In book two the number of votes shown in the return differs from the number of votes shown on the Tally Sheet of book two with respect to all sixteen candidates but the number of votes shown in the return of book two agrees with that recorded in the return of book one with respect to twelve candidates.

"(4) In some instances both Tally Sheets and returns show a greater number of votes cast than ballots issued.

"In view of the foregoing the County Clerk and his assistants have been unable from their examination of the Tally Sheets and Returns of both books to ascertain the actual number of votes any of the sixteen candidates received at the general election.

"A Petition was filed in the Circuit Court by the County Clerk and his two assistants in which the Court was informed of the foregoing facts and was requested to make an order that the ballot

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boxes be opened under proper safeguards in order that the actual number of votes each candidate received in Precinct E of the Fourth Ward might be ascertained. The Circuit Court dismissed the Petition for want of jurisdiction. A copy of the memorandum opinion of the Court is herewith enclosed as of possible interest.

"The County Clerk has requested this office to inform you of the foregoing facts and to request your opinion regarding this matter, also to inquire whether the County Clerk under the Provisions of Section 11615 cited above may give to the candidates entitled thereto, certificates of election notwithstanding that his two assistants do not concur in the number of votes cast up for each of the candidates and decline to sign or approve the certificate."

Section 11614, R. S. Mo. 1939, provides as follows:

"At the close of each election the judges shall transmit one of the poll books by one of their clerks or by registered mail at their discretion to the clerk of the county court in the county in which the election was held within two days thereafter; if the poll books are not returned in the time provided the clerk shall have the power to either send the sheriff or a messenger for said books; the other poll book shall be retained in the possession of the judges of election open to the inspection of all persons: Provided, that if such poll books be transmitted by messenger, the county court shall pay such messenger for such service at the rate of ten cents per mile for each mile necessarily traveled, going and returning."

Only one set of poll books are to be delivered to the county clerk. Since the judges and clerks of precinct E of the fourth ward in the City of St. Joseph, Missouri have furnished the county clerk with two sets of poll books, then the one to be accepted by the county clerk must be the one that has been properly signed and certified to by all the judges and clerks as provided by law (Sec. 11610, R. S. Mo. 1939). Therefore, poll book No. 1 which has been executed by all the judges and clerks shall be the poll book accepted by the clerk of the county court and considered by

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the canvassing board. Poll book No. 2 may be disregarded.

Section 11616, R. S. Mo. 1939, Sec. 111.72, House Revision Bill No. 2049, Revision 1949) provides as follows:

"When the judges of election of any voting precinct in any county in this state, or in any city in this state not within a county, in casting up the totals of the votes cast in such precinct at any primary or general election, shall make an error giving to any candidate for nomination or election to any office in such county, or city, or to any candidate for any district office voted for entirely within such county, or such city, a greater or less number of votes than such candidate actually received, as shown by the tally sheet of such precinct, it shall be the duty of the county clerk of such county, or of the board of election commissioners of any such city, and the board of election commissioners in all cities of this state having such board, before certifying to the nomination or election of any candidate for a county office, or for a district office voted for entirely within such county, or such city, to give to the candidate or candidates whose total vote, as certified by the judges of election is more or less than the number of votes actually cast for such candidate or candidates, as shown by the tally sheet of such precinct, the actual number of votes cast, for such candidate or candidates in the precinct or precincts in which such error, or errors, occurred, the certificate of the judges of election to the contrary notwithstanding."

(Underscoring ours)

This section gives the county clerk of Buchanan county the authority to correct errors made by judges on poll book No. 1 as to the total number of votes cast for the respective candidates so that the total number of votes shown on the tally sheet of book No. 1 corresponds with the number of votes shown on the poll book. If the number of votes shown on the poll book differs from the votes shown on the tally sheet with said poll book No. 1 then the votes should be changed on the poll book to correspond with the votes shown on said tally sheet.

Section 11618, R. S. Mo. 1939, provides as follows:

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"Any county clerk, or any member of any board of election commissioners, who shall fail or refuse to comply with the provisions of section 11616 shall be deemed guilty of a misdemeanor, and, upon conviction thereof, punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than ninety days nor more than one year, or by both such fine and imprisonment."

The fact that the tally sheets and returns show a greater number of votes cast than ballots issued is not a matter of concern of the canvassing board.

The Supreme Court of Missouri in the case of State ex rel. Attorney General v. Vail, 53 Mo. 97, l.c. 111, has said:

"* * *The Governor, under our Constitution and laws, is an executive officer, not a judicial one. He is provided with no means of investigating questions of fact. In the matter of elective officers he is simply authorized to issue commissions. (Const., Art. 5, Sec. 25; Stat., p. 570, Sec. 32.)

"It could hardly be maintained, that upon an ex parte affidavit or statement he would be warranted to disregard official returns, yet he has no means of resorting to any other kind of evidence. He is relieved of all responsibility by issuing a commission to the person who appears on the records filed at the seat of government to be entitled to it. Though these records may not be conclusive in investigations in either contested elections or judicial proceedings the Governor at least is concluded by them, for he has no means of ascertaining their truth or falsity. His official duties in this matter are purely ministerial. This is the rule as established by the decisions of this Court, in regard to all ministerial officers. (State ex rel., Bland vs. Rodman. 43 Mo. 257.)

"It applies to the Secretary of the State, and to the clerks of the counties, in the exercise of the functions respectively confided to them in regard to elections. 'The law' say the Court, in State vs. Rodman, (43d Mo. R.) 'does not seem to have invested in the Secretary, any discretion in the premises. It requires him to perform the act of opening and counting the returns. It is the law declared by this

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Court as well as by the general current of authority, that a County Clerk, or the Secretary of State, in opening and casting up votes, acts ministerially and not judicially. The matter of determining upon the legality of votes is a judicial function, to be passed upon before a tribunal competent to make an adjudication where the parties interested may be heard.'

"The same point was so held in State ex rel., Attorney General vs. Steers, 44th Mo., p.223. There it is said, in reference to the return of the Clerk of Ralls County:

"If the clerk has sufficient mathematical ability to correctly count up returns, he is perfectly qualified for his office, for that is the only duty devolved on him by law.

"To determine upon the legality of votes is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims.

"To allow a ministerial officer arbitrarily to reject returns at his mere caprice or pleasure, is to infringe or destroy the rights of parties, without notice or opportunity to be heard-- a thing which the law abhors and prohibits. Admit the power, and there will be no uniformity. One canvassing officer will reject for one thing, and another for a different matter, and no man can tell whether he is legally elected to an office, until he consults the notions of a canvasser. The exercise of such a power is subversive of the rights of the citizen and dangerous and fatal to the elective franchise. But it is enough to say that the claim is utterly unauthorized. The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where the parties interested can appear and have a fair trial upon pleadings and proofs.

"When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law and guilty of usurpation." (underscoring ours.)

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The Supreme Court of Missouri in the case of State ex rel. Donnell v. Osburn, 147 S.W. 2d. 1065, 1.c. 1068; 347 Mo. 469, has held:

"* * *We held official returns to be prima facie evidence of election and good until proven otherwise by contest in State ex rel. Attorney General v. Vail, 53 Mo. 97.

* * * * *

"The duties enjoined upon the speaker place him in the same category as a mere canvassing officer or canvassing board. By the overwhelming weight of authority throughout the country the functions and duties of canvassers are purely ministerial. 20 C.J. Sec. 254, 18 Am. Jur. Sec. 254. This state follows the weight of authority. The rule here adopted is that the duty of casting up the vote certified by the returns and ascertaining who received the highest vote is a purely ministerial duty, and being such the canvassers have no right to go behind the returns. Mayo v. Freeland, 10 Mo. 629; State ex rel. Attorney General v. Steers, 40 Mo. 223; State ex rel. Metcalf v. Garesche, 65 Mo. 480; State ex rel. Ford v. Trigg, 72 Mo. 365; State ex rel. Broadhead v. Berg, 76 Mo. 136; Barnes v. Gottschalk, 3 Mo. App. 111; State ex rel. v. Stuckey, 78 Mo. App. 533; State ex rel. Glenn v. Smith 129 Mo. App. 49, 107 S.W. 1051; State ex inf. Anderson v. Moss, 187 Mo. App. 151, 172 S.W. 1180. We see no reason why this is not also true of the canvass which the speaker is required to make by Section 3."

In view of the above statutes and decisions of the Supreme Court of Missouri, we do not see how the county clerk and his two assistants, who constitute the canvassing board, could have any difficulty in determining the total number of votes cast in precinct E of the fourth ward in the City of St. Joseph, Missouri, for each candidate. They should all sign the abstract of the votes cast in Buchanan County without further delay.

29 C. J. S., pages 340 and 343, says:

"It is a common error for a canvassing board to overestimate its powers, but, since such a board is ordinarily a creation of constitution or statute, it may be stated generally

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that it has such powers and duties, and only such, as are conferred by the constitution or statute creating it, notwithstanding their exercise of certain judicial or discretionary powers, the powers and duties of the members of a board of canvassers are primarily ministerial in nature, being limited generally to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained. * * *

* * * * *

"* * *Where the board of canvassers wrongfully refuse to canvass all the returns they may be compelled to do so by mandamus or other appropriate remedy."

Section 11463, R. S. Mo. 1939, (Sec. 111.11 House Bill 2049, Revision 1949) provides as follows:

"The clerks of the several courts to whom a transcript of the votes is directed shall, within two days after the time limited for the examination of the polls, deliver to the nearest postoffice on the most direct route to the seat of government, addressed to the secretary of state, a fair abstract of the votes given in their respective counties, by precincts for members of congress, governor, lieutenant governor, state senators and representatives, judges of the circuit courts not subject to the provisions of section 29, Article V, of the Constitution of Missouri, secretary of state, state auditor, state treasurer and attorney general. Such abstracts shall be enclosed in strong envelopes, closely sealed, which shall in no case be opened until the second Tuesday of December next after the election, and the said envelopes shall be endorsed by the clerk:

"Returns of an election held in the county of _____ on the _____ day of _____, A.D. 19____ for the offices of _____, etc."

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Section 11622.1 R.S.A. Laws Mo. 1945, p. 898, provides as follows:

"When any person shall have been elected a state senator from a senatorial district wholly within one county, the county clerk of such county, unless otherwise provided by law, shall issue to that candidate receiving the highest number of votes for the office of state senator a certificate of election to said office of state senator and shall certify the fact of such election to the Secretary of State."

Section 11464, R. S. Mo. (Sec. 111.13 House Bill 2049, Revision 1949) provides as follows:

"If there shall be a failure to receive any of the returns at the seat of government for one mail after the same is due, the secretary of state, unless the circumstances shall clearly justify a longer delay, in no case to exceed thirty days from the time of such election, shall dispatch a messenger to the county not returned, with directions to bring up the abstract."

Section 11465, R. S. Mo. 1939, provides as follows:

"If such failure shall happen by neglect of the clerk he shall forfeit to the state one hundred dollars, together with the expenses of such messenger, to be recovered by civil action before any court having jurisdiction thereof. And it shall be the duty of the secretary of state to direct the prosecuting attorney of the proper county forthwith to institute such action against such delinquent clerk."

The duty is upon the county clerk to transmit a transcript of the votes cast in Buchanan County to the Secretary of State of Missouri.

The county clerk cannot perform his duties as set forth above until the votes are tabulated by the three members of the board of election canvassers. It is true that the county clerk constitutes one of the said canvassers. It is the duty of the canvassers to mathematically tabulate the votes cast in their county from the returns made in the poll books by the judges and clerks of election

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of the different voting precincts in their county. The canvassers do not certify that the judges and clerks have correctly counted the ballots. It is the duty of the canvassers to record the total vote cast for each candidate as determined by their mathematical computation from said returns. It is the duty of the canvassers to then sign the certificate at the end of the "abstract of votes cast in Buchanan county." The certificate that the canvassers sign states in the certificate that it is based upon the returns made by the various voting precincts in said county.

CONCLUSION

It is the conclusion of this department that the poll book executed by all the judges of the precinct mentioned in your letter and attested to by all the clerks of said precinct shall be considered as the poll book filed with the county clerk as provided by Section 11614, R. S. Mo. 1939, and the other poll book (No. 2) left with the county clerk shall be disregarded by the canvassers. The county clerk has authority to correct the total number of votes shown on poll book No. 1 so that said totals correspond with the number of votes cast for the various candidates as shown by the tally sheet filed with poll book No. 1. The fact that the tally sheet and returns on poll book No. 1 may show in some instances a greater number of votes cast than ballots issued is of no concern to the county clerk or board of canvassers.


The total vote for each candidate shall be tabulated by the canvassers from the corrected poll book No. 1 of the precinct mentioned in your letter. Then the said results shall be added by the canvassers to the other votes cast in Buchanan County. The abstract or returns of the total vote cast for each candidate in Buchanan County can be thereby mathematically determined. When the results have been mathematically determined and recorded in the "abstract of votes cast" the canvassers shall then sign the certificate at the end of said abstract. Then the county clerk shall immediately issue certificates of election to the respective county candidates (and state senator) having the highest number of votes, and he shall transmit immediately to the secretary of state of Missouri an abstract of said votes concerning the officials named in Section 11463, R. S. Mo. 1939, as amended H.B. 2049, Revision 1949.

APPROVED:


J. E. TAYLOR
Attorney General

SJM:mw

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

OFFICERS: County superintendent is entitled to full compensation until date of resignation, although he was out of the county most of each week, inasmuch as his compensation is an incident to and attaches to the office.

FEEES AND SALARIES:

December 5, 1950

Honorable Albert D. Nipper
Prosecuting Attorney
Washington County
Potosi, Missouri



12/8/50

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"In this current problem I shall try and be as brief as possible, and equally fair to both parties concerned. The one being our County Court and the other our recently resigned County Superintendent of Schools. The main issue settles around the construction of #10617 of Revised Statutes of Missouri, 1939.

"Our past Superintendent on September 5, 1950 accepted a position in Riverview (North St. Louis) which he informed me is entitled 'Principal and Superintendent of Teachers,' that he did not teach and does not teach there, that he has performed all other duties incumbent upon him to so perform under the law; that he came back to Potosi every week end from St. Louis during September and worked and performed the duties of his office during that time; that he did not resign until October and that he is entitled to his full months pay for the month of September.

"Our County Court holds the view that during the month of September said Superintendent did 'engage in other employment that interferes with the duties of his office as prescribed by law.' However, if this contention be taken, what penalty, punishment

Honorable Albert D. Nipper

or consequence is then provided, if any, by law?

"In short, the County Court believes that during this month the Superintendent was 'holding down two jobs' and that such is contradictory to the law. On the other hand the Superintendent states that he has fulfilled all his requirements as specified by law, even though Monday through Friday afternoon he spent in St. Louis because on Friday evening through Sunday he spent in his office in Posoti performing his duties.

"ISSUE: Is this County Superintendent entitled to all the full pay of his office for the month of September, including the Bus Transportation pay? Is he entitled to pay only for actual days worked? Has he forfeited any or all of his pay by the action above stated?"

Section 10609, Laws of Missouri, 1943, page 890, Mo. R.S.A., provides for the election of a county superintendent of schools for a specific term of office and the qualifications for said official. Without quoting the statute, we assume that the county superintendent in question was duly elected to his office and held said office up until the date of his resignation in October of 1950.

In view of the facts which you have related, indicating an absence from the county by the official in question during the month of September, 1950, you inquire whether or not said official is entitled to the compensation provided by law for said month, particularly in view of the provision in Section 10617, Laws of Missouri, 1945, page 1674, which, in part, provides:

"During his term of office the county superintendent shall not engage in teaching or in any other employment that interferes with the duties of his office as prescribed by law. * * *"

While the above-quoted statute sets out certain things that a county superintendent shall not do or engage in, we fail to find any specific statutory penalty should a county superintendent fail to comply with the above-quoted provision of the statute.

Honorable Albert D. Nipper

In reading your letter it would appear that the county court is of the opinion that during the month of September the county superintendent neglected to fully perform the duties of his office and is therefore not entitled to compensation for that month.

The appellate courts of this state have on many occasions declared the rule by which a public official is entitled to the compensation for the office which he holds.

In the case of State ex rel. Nicolai v. Nolte, 180 S.W. (2d) 740, 352 Mo. 1069, the court, at S.W. 1.c. 741, 742, stated the rule as follows:

"There is also a principle equally well fixed that so long as an officer holds his office the salary provided for the office belongs to him because the law attaches it to the office; because it is an incident to the office. * * *"

In the case of Cunio v. Franklin County, 285 S.W. 1007, 315 Mo. 405, suit was instituted by the plaintiff to recover salary allegedly due him as probation officer of the defendant county. At S.W. 1.c. 1008 the court declared:

"The decision turns on the fact of plaintiff's appointment to said office. If he was appointed thereto, he is entitled to the emoluments thereof.

"It is a well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office. * * *"

In the above case the plaintiff failed to prevail in recovering the salary due to the fact that he failed to prove that he had been duly appointed to the office, and was not therefore a de jure officer of the defendant county.

In the case of Bates v. St. Louis, 54 S.W. 439, 153 Mo. 18, we find a case somewhat similar factually to the situation which you have presented. A proceeding in equity was instituted to

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restrain the city treasurer from paying the mayor of the city his salary for three specified days, during which time it was alleged that he was absent from the city on personal business and therefore did not perform the duties of his office. In holding that the mayor could not be denied his salary the court, at Mo. l.c. 20, 21, said:

"It is well settled law that 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law, and as an incident to the office. . . . 'The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office.'"

* * *

"As is well said in Throop on Public Officers, sec. 500, quoting from Robinson, J., in People v. Green, 5 Daly (N.Y.), pp. 268, 269:

"The right of an officer to his fees, emoluments, or salary, is such only as is prescribed by statute; and while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment, provided by law. The compensations for official services are not fixed upon any mere principle of quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. This may in many cases be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. * * * He accepts the office "for better or worse;" and whether oppressed with constant and overburdening cares, or enabled from absence of claim upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim

Honorable Albert D. Nipper

therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties. . . . The fees or salary of office are "quicquid honorarium," and accrue from mere possession of the office."


CONCLUSION

Applying the foregoing authorities to the situations which you have presented, it is the opinion of this department that the county superintendent is entitled to the compensation allowed him by law up until the date of his resignation and including the month of September, 1950.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



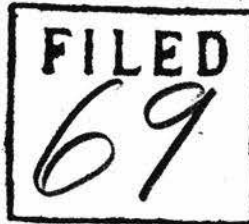
J. E. TAYLOR
Attorney General

RFT:ml

SCHOOLS: The tax books of a county should be set up by the county
TAXATION: clerk extending the school taxes in accordance with the
territory incorporated into each legally formed reorganized
or enlarged school district, and the former school district
numbers comprising said territory should be discontinued.

June 14, 1950

Mr. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



6/15/50

Dear Sir:

I.

This will acknowledge receipt of your request for an official opinion from this department. Your letter of May 19, 1950, is as follows:

"Please advise this office whether, under the new school consolidation act, if the tax books should be set up in accordance with the new districts as voted upon by the people of this County, in 1949, or whether the tax books should continue carrying them under the old school district numbers."

Your letter of May 25, 1950, furnishing additional information to us, is as follows:

"In reply to your letter of May 23rd, please be advised that a favorable vote was given upon the question of organization of a new reorganized school district in our County, and that a Board of Directors has been elected for such district and are now functioning."

II.

Since the reorganized school district in your county has received a favorable vote and the board of directors of said district are functioning as such, then a consideration of the 1931 School Law, as amended by Laws No. 1947, Vol. 2, pages 377, is in order.

Section 11 of said Laws No. 1947, pages 370-377, is as follows:

Mr. James L. Paul

"The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the plan of reorganization and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district. If any former six-director district shall be merged in any enlarged district, as provided herein, the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settlement therefor as provided by Section 10450, Revised Statutes of Missouri, 1939: Provided, that the directors of such enlarged district shall faithfully perform all existing contracts and legal obligations of the component districts."

Section 10450, R. S. Mo. 1939, provides as follows:

"The terms of office of all school officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the provisions hereof and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the treasurer of such enlarged district. If any former six-director district shall be merged in any enlarged district, as provided herein, the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settle-

Mr. James L. Paul

ment therefor as provided by section 10480:
Provided, that the directors of such enlarged district shall fully perform all existing contracts and legal obligations of the component districts."

The above and foregoing sections are exactly the same in all respects except for one word. Section 11, supra, uses the word "faithfully" in the last proviso of the section. Section 10450, supra, uses the word "fully" in the last proviso of said section. Section 10450, supra, was a part of the 1931 School Law and was not repealed by Laws Mo. 1947, supra. The 1947 Laws of Mo. Vol. 2, pages 370-377, did repeal the first eight sections of the 1931 School Law (Secs. 10442-10449, R. S. Mo. 1939).

The 1947 Act enacted seventeen new sections in lieu of the sections repealed. Section 11, quoted above, provides that the various school districts comprising the territory incorporated into the enlarged or reorganized school district shall cease upon the adoption of the plan of reorganization and the organization of the board of directors.

Section 10450, supra, cited above, provides that the terms of office of all school officers of the various school districts comprising the territory incorporated in such enlarged school district shall cease upon the adoption (of plan of reorganization) and the organization of the board of directors.

Section 10347, R. S. Mo. 1939, reenacted, Laws 1945, page 1629, provides as follows:

"The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the County Superintendent of Schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

Mr. James L. Paul

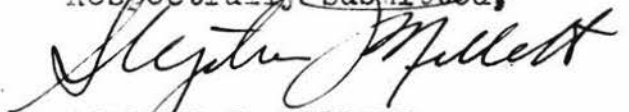
This section provides that the board of directors of the school district shall, on or before the 15th day of May of each year, make an estimate of the amount of funds necessary to sustain the schools in their district for the time required by law. If the reorganized school district was adopted by the people and the board of directors elected and organized before May 15th of any year then it would be the duty of the board of directors of such a reorganized, enlarged district to file the estimate required by said Section 10347, supra. The directors of the various school districts comprising the territory incorporated into said enlarged school district would have no authority to file such estimate according to the provisions of Section 10450, R.S. Mo. 1939, and Section 11, Laws Mo. 1947, pages 370-377, because all their duties and authorities cease on the adoption of the plan of reorganization and the organization of the board of directors of the enlarged school district.

The Supreme Court of Missouri on June 13, 1950, rendered a decision in a case entitled State of Missouri at the relation of reorganized school district No. 4 of Jackson County, Missouri, relator, vs. W. H. Holmes, State Auditor of Missouri, respondent, in which the constitutionality of the 1947 Act relating to the organization of enlarged school districts was upheld. Therefore, the 1947 Act relating to reorganized or enlarged school districts is valid and constitutional.

CONCLUSION

It is therefore the opinion of this department that the tax books of a county should be set up by the county clerk extending the school taxes in accordance with the territory incorporated into each legally formed reorganized or enlarged school district, and the former school district numbers comprising said territory should be discontinued.

Respectfully submitted;



STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:



J. L. TAYLOR
Attorney General

SJM:mw

COUNTY LIBRARY DISTRICT: Authorized to purchase personal property necessary to the operation of the county library district; may purchase and operate Bookmobile. Title to Bookmobile would vest in the county library district, a corporate body.

August 29, 1950

8-30-50

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



Dear Mr. Paul:

This department is in receipt of your recent request for an opinion on the following question:

"Having just read the opinion rendered to the Prosecuting Attorney of Ray County, under date of June 27th, 1950, by inference contained in the discussion of the question presented to you by the Honorable Wilson D. Hill, I am lead to believe that the County Library Board would not have the authority to invest any part of the funds collected by the tax levy for the purpose of purchasing personal property.

"I would, therefore, appreciate you giving me your opinion on the following question. Does the County Library Board of the County of the fourth class have the right and authority to purchase from the revenue collected for the County Library, a Bookmobile and other personal property incident to conducting the County Library and the operation of the Bookmobile?

"If the answer to the question of purchasing the Bookmobile is in the affirmative, in whom should the title be vested."

County library districts are organized under authority of Article 6, Chapter 110, R. S. Mo. 1939. Section 14767 thereof authorizes the establishment of a county library district which "shall be a body corporate, and known as such."

Section 14769 of this article reads as follows:

"Said _____ county library district' as such body corporate, by and

Honorable James L. Paul

through said county library board, shall have power to sue and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches thereof, and to sell and convey real estate and personal property for and on behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property."

It appears clearly expressed in this article that a county library board may own and lease real or personal property for and on behalf of the county library and branches thereof. It was held in the opinion referred to in your letter that a county library board may not invest surplus funds in interest bearing investments when such surplus was created through proceeds collected under a tax levy.

Section 14775 of this article provides:

"The services of a free county library may be direct loan of books, pictures or periodicals, through branches, stations, school traveling libraries or book wagons; but in all cases service shall be freely accessible to all residents of the county library district."

It is the opinion of this office that a county library board is authorized to purchase from revenue collected for the county library a vehicle to be used as a traveling library or book wagon commonly referred to as a Bookmobile, and that title to such Bookmobile should be vested in the body corporate which would be created and known as the "_____ county library district."

Honorable James L. Paul

CONCLUSION


The County Library Board in a county of the fourth class is authorized to purchase from the revenue collected for the county library, a Bookmobile and other personal property incident to conducting the county library and the operation of the bookmobile.

Title to the bookmobile would vest in the county library district which is created as a corporate body.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JEM:VLM

CRIMINAL LAW:
DISTURBING THE PEACE:

The right of religious freedom may not be so construed to justify practices inconsistent with the good order, peace or safety of the state or with the rights of others. Whether the facts stated in your letter constitute a breach of the peace is a question of fact to be determined by all the evidence and circumstances.

September 21, 1950

10-6-50

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri



Dear Sir:

I.

This will acknowledge receipt of your request for an official opinion of this department, which request reads as follows:

"Does a religious meeting which continues until 11:00, 12:00 or 1:00 o'clock at night and conduct in such a manner that loud and unusual noises emanate from their gathering constitute a peace disturbance to adjoining neighbors, and if so, who are the proper persons to make defendants thereto?"

Section 5 of Article 1 of the Constitution of Missouri(1945) provides as follows:

"Religious Freedom--Liberty of Conscience and Belief--Limitations.--That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others."

Section 4636, R. S. Mo. 1939, provides as follows:

Honorable James L. Paul

"If any person or persons shall wilfully disturb the peace of any neighborhood, or of any family, or of any person, by loud and unusual noise or by offensive or indecent conversation, or by threatening, quarreling, challenging or fighting, every person so offending shall, upon conviction, be adjudged guilty of a misdemeanor."

The leading case on the question presented by your request is the case of City of Louisiana v. Bottoms, 300 S.W. 316. The St. Louis Court of Appeals in this case said, l.c. 317, 318:

"The alleged offense of which defendant stands convicted was committed during the course of a religious service, attended by 15 members of his little flock, commencing at 7 o'clock, and ending about 9:20 on the evening in question. The particular conduct of defendant said to have disturbed the peace of the good citizens of Louisiana was his shouting 'Amen,' 'Praise God,' and 'Glory Hallelujah,' at intervals throughout the service, in a tone of voice which was actually heard by certain persons at a distance of two blocks from the church, although those of the witnesses for the city who seemed to entertain the greatest respect for defendant's vocal powers were frankly of the opinion that his shouts could have been heard even at a distance of six blocks.

"It appears from plaintiff's own evidence that the particular meeting at which the disturbance was alleged to have occurred was graced by the presence of 100 or more white people, who stayed outside in their automobiles, and that on other similar occasions as many as 300 white people had attended. It is a further fact worthy of note that, eliminating the two police officers who testified in the case, of the remaining twelve witnesses called by the city, five of them were among those whose curiosity had prompted them to be present at this particular service.

"The particular ordinance which defendant is

Honorable James L. Paul

charged to have violated provides that, if any person shall willfully disturb any lawful assembly of people by loud or indecent behavior, or shall give or make a false alarm of fire, or shall in the nighttime be guilty of loud and boisterous hallooing, quarreling, yelling, or screaming, by which the peace of the citizens may be disturbed, he shall be guilty of misdemeanor.

* * * * *

"In general terms, a breach of the peace is a violation of public order and decorum, or a disturbance of the public tranquility, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. City of St. Louis v. Slupsky, supra; City of Plattsburg v. Smarr (Mo. App.) 216 S.W. 538; 9 C.J. 386; 8 R.C.L. page 284, Sec. 305. The same authorities hold that by the term 'peace,' as used in such connection, is meant the tranquility enjoyed by the citizens of a municipality or community, where good order, which is the natural right of all persons in political society, reigns among its citizens. However, whether or not a given act or state of conduct amounts to a breach of the peace, depends upon the circumstances attending the act, such as the identity of the offending party, as well as of the complaining party, and the occasion therefor. State v. Sturges, 48 Mo. App. 263; State v. Riley (Mo. App.) 265 S.W. 874; State v. Lakey (Mo. App.) 275 S.W. 565.

"While fully appreciating the fact that the municipal assembly of plaintiff city, in the exercise of its powers, saw fit to particularize hallooing, yelling, and screaming as acts which, when done in the nighttime, might tend to disturb public tranquility, nevertheless we cannot bring ourselves to believe that the language of such ordinance, when strictly construed, can be held to contemplate and embrace conduct such as that of the defendant complained of in this action. We grant that to most people such manifestation of religious fervor might seem wholly unnecessary, if not ridiculous, and that to many it might indeed be offensive. But yet we are firmly of the opinion

Honorable James L. Paul

that the isolated instance of overzealous worship involved in this proceeding did not interfere with the usual good order which otherwise prevailed among the citizens of Louisiana, so as to justify the bringing of defendant before the bar of justice to answer therefor in a proceeding partaking of the nature of a criminal action. Indeed there was once a time in this country when a minister, whose voice would not have carried for a greater distance than two city blocks, would certainly have been accepted with greatly restrained enthusiasm, and most likely would have been regarded, even by his most faithful parishoners, as a downright failure in the ministry.

"It must be borne in mind that we do not arrive at our conclusion in this case from the false premise that the calling of defendant as a regularly ordained minister of the gospel entitled him to any rights not possessed by other citizens, or rendered him in any wise immune to the ordinary application of the law. We say this for the reason that, while our basic law provides that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience, yet the liberty of conscience so secured may not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace, or safety of the state, or with the rights of others. Article 2, Sec. 5, Const. Mo.; City of St. Louis v. Hellscher, 295 Mo. 293, 242 S.W. 652.

"In fact, there are cases in the books, though from other jurisdictions, which establish conclusively that the transgressor may not shield himself behind the vestments of the clergy when brought to task for the use of foul and obscene language in the pulpit. Delk v. Commonwealth 166 Ky. 39, 178 S.W. 1129, L.R.A. 1916B, 1117, Ann. Cas. 1917C, 884; Holcombe v. State, 5 Ga. App. 47, 62 S.E. 647. Likewise the beating of a drum upon the streets, no permit having been secured from the proper officer, has been held to be a breach of the peace, even though done in the performance of a religious service, when the statute expressly provided that it should be unlawful for any person to beat a drum, except by command of a military official having authority therefor. State v. White, 64 N.H. 48, 5 A. 828.

Honorable James L. Paul

"The case at bar, however, presents a far different situation. Here defendant stands charged, not with the use of obscene or indecent language, and not with having performed any act expressly prohibited by the ordinance, unless the latter be so construed as to comprehend and regulate the volume of sound that may be employed in a lawfully conducted church service, whether it be of a lowly negro congregation, housed in a temporary frame shack on the outskirts of the town, or of a fashionable white congregation, assembled together in a beautiful and costly edifice, erected in an exclusive residential district. That the city fathers, in the enactment of such ordinance, intended that it should be given such effect, we cannot believe.

"We have observed that the witnesses for the city complained in their testimony, not so much of the shouting of defendant during the single church service in question, as of the fact that they had been annoyed by similar occurrences over a long period of time. While such a case is not before us, it would seem at first blush that the condition complained of might be subject to be abated in a proper proceeding, and upon proper proof. As to the case at bar, however, we are constrained to hold as a matter of law that no breach of the peace, contemplated by the ordinance in question, was shown, from which it follows that defendant's requested instruction for a directed verdict in his favor at the close of all the evidence should have been given." (Underscoring ours)

The United States Court of Appeals in the case of Minersville School District v. Gobitis et al., 108 F.2d 683 cites the City of Louisiana v. Bottoms case, supra, with approval and says, l.c. 688, 689;

"We have then to balance the two intangibles ~~slus~~ and religio and determine to which arm of the scale the weight of our decision must be added. In doing so, under our system of

Honorable James L. Paul

case law, we are entitled, or rather constrained, to examine the precedents. Cordozo, The Nature of The Judicial Process. All of these that are cited in either brief and many more besides are collected in four standard sources. 11 Am. Jur. pp. 1100-1104; 16 C.J.S. Constitutional Law, Sec. 206, pp. 599-603; American Digest System, Constitutional Law, 84; U.S.C.A. Constitution, Part 2, pp. 453-456; and see Association of American Law Schools Selected Essays on Constitutional Law, Vol. 2, pp. 1108-1175. Having examined these decided cases, we, again under our system, must search for a ration decidendi, and then include or exclude our own particular set of facts.

"As indicated by their decisions, our courts consider that the peace and good order of the community must prevail over conscience, (a) wherever its mental or physical health is affected, (b) wherever a violation of its sense of reverence makes a breach of the peace reasonably foreseeable, and (c) wherever the 'defense of the realm' is imperiled. * * *"

You will note that the court in the City of Louisiana v. Bottoms case, supra, suggested that the condition complained of might be abated by an injunction suit.

Section 4636, supra, sets out three different grounds that would constitute a breach of the peace. The first ground, that is, "by loud and unusual noise" would be the only one that would apply in your case, in our opinion.

The proper persons to make defendants would be the persons you believe from the evidence are guilty of making the loud and unusual noises. We cannot say who should be made defendants because we do not have the facts. Your investigation of all the facts and circumstances will enable you to determine this question.

The Supreme Court of Missouri in the case of State v. Wymore, 132 S.W.2d. 979, 1.c. 988, said:

"Under the rule, if it is the statutory duty of a prosecuting attorney to commence and prosecute criminal actions, by necessary implication, he should qualify himself to determine, in the exercise of an honest discretion, if a prosecution should be commenced. The only way he can determine the question is to make an investigation

Honorable James L. Paul

of the facts and applicable law. If he determines there should be a prosecution and determines, in the exercise of an honest discretion, that he should proceed by information, also, by necessary implication, it is his duty to do whatever is necessary, under the law, to authorize the filing of the information. In making an investigation he qualifies himself to make and swear to the information."

CONCLUSION

It is the conclusion of this department that while our State Constitution provides that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, yet this right shall not be so construed as to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others. Whether the facts stated in your letter constitute a breach of the peace, as contemplated by Section 4636 R. S. Mo. 1939, would depend upon all the circumstances attending said religious meeting, including whether or not the neighborhood, or any family or any persons have been disturbed in their peace. It is a matter within the discretion of the Prosecuting Attorney as to the form of action, if any, that may be filed and as to who shall be made defendants therein.

Respectfully submitted,

Stephen J. Millett

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw

COUNTY HIGHWAY ENGINEER: County court in second, third and
COUNTY SURVEYOR: fourth class counties authorized to
COUNTY COURTS: appoint county highway engineer.
County court may, in their discre-
tion, appoint the county surveyor as county highway engineer.
County surveyor does not hold office as ex officio county highway
engineer by virtue of holding office as county surveyor.

September 28, 1950



Honorable Elmer Peal
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

This office is in receipt of your recent request for an opinion which request reads as follows:

"Section 8560 of Revised Statutes provides in effect that in Counties with a population of not less than 20000., or more than 50000., that by virtue of their office County Surveyors shall be ex officio highway engineer in such Counties.

"Mr. Charles S. Reynolds, our County Surveyor states that by virtue of section 8560 above he is the County Highway Engineer; that the County Court appointed one to act for and do the work of Highway Engineer not being a Civil Engineer instead of requiring the County Surveyor to do the work of Highway Engineer; that desired to act as Highway Engineer but the County Court refused to permit him to act and appointed another to act as Highway Engineer.

"Mr. Reynolds is concerned about his right to the office of Highway Engineer under above Section, and whether the County Court had the legal right to appoint another when said Section provides that in such Counties as this (population 46,000) he is Highway Engineer by virtue of being County Surveyor.

Honorable Elmer Peal

"I shall appreciate it if your office will give me an opinion as to the meaning of said Section and as to the rights of the Court and the Surveyor in such a situation."

In your letter you refer to Sec. 8560, R. S. Mo. 1939. This is evidently an error since that section has no relation to the problem presented by you. We infer, however, that the section to which you intended to refer was Sec. 8660, R. S. Mo. 1939.

You will note, however, this section was repealed and reenacted in 1945 (Laws of Missouri, 1945, p. 1493, Sec. 1) and substantial changes made by the State Legislature. While this section 8660, R. S. Mo. 1939, did provide that in counties which contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor should be ex officio county highway engineer this law has been altered by the repeal and reenactment of this Section.

Said section as reenacted in Laws of Missouri, 1945, p. 1493, Section 1, now reads as follows:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor; Provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

Your attention is also directed to Sec. 8655, R. S. Mo. 1939, as repealed and reenacted by Laws of Missouri, 1945, p. 1493:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular

Honorable Elmer Peal

meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of this article shall apply only to counties of classes two, three and four."

We think the county court now has within their discretion the right to appoint or not appoint the county surveyor to the office of county highway engineer and to discharge the county highway engineer employed by the county court and employ another at the pleasure of the county court in counties of class two, three and four.

These sections expressly confer upon the county court the power to appoint a county highway engineer and provides "the county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer * * *."

CONCLUSION

The county courts of each county in classes two, three and four are authorized to appoint a county highway engineer for such length of time as may be deemed advisable by the court.

The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer. The county highway engineer so appointed by the county court does not hold office as ex officio county highway engineer by virtue of holding office as county surveyor.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

COMPTROLLER: Comptroller should pay claims under appropriation
APPROPRIATIONS: for relief of county clerks although original
claim accrued more than two years prior to
presentation.

January 4, 1950

1/12/50

Honorable E. L. Pigg
State Comptroller
Jefferson City, Missouri

FILED
71

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Sections 10.210, 10.280 and 10.720 of House Bill 433 appropriate money for the payment of claims of certain county clerks for making and extending tax books, as provided in Section 11238, R. S. Mo. 1939.

"These accounts were not presented for payment within two years from the time they accrued. (Section 13038, R. S. Mo. 1939, also Laws 1945, page 1442, Section 40.) If these accounts had been presented at the proper time they would have been paid. Since they were more than two years old when presented, payment was refused.

"My question: Since the General Assembly has made an appropriation for payment of these claims in H. B. 433, can they now be legally approved for payment? I would like to have your opinion on this question."

Section 11238, R. S. Mo. 1939, which was amended by Laws of Missouri, 1945, pages 1823 and 1956, provides for the payment by the state to the county clerk of certain fees for his services in preparing and extending the tax books. That section was further amended by House Bill No. 126 of the 65th General Assembly, but the amendment is immaterial in the present situation.

Honorable E. L. Pigg

The following provision is found in Laws of Missouri, 1945, page 1442, Section 40:

"Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the comptroller, for his approval, within two years after such claims shall accrue, and not thereafter."

A similar provision was found in Section 13038, R. S. Mo. 1939 (now repealed), applicable to the State Auditor.

Section 10.210 of House Bill No. 433, 65th General Assembly, provides as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Seven Hundred Forty-six Dollars Thirty-one Cents (\$746.31), for the relief of T. E. Bell, Clerk of the County Court of Iron County, Missouri, for preparing and extending the state's portion of the tax books in the County of Iron for the years 1942, 1943, 1944, 1945 and 1946."

Section 10.280 of said bill makes similar provision for the County Clerk of Reynolds County for the years 1942, 1943, 1944, 1945 and 1946. Section 10.720 does likewise for the County Clerk of Dent County for the years 1945 and 1946.

There have been few cases which have considered the effect of the statute limiting the time within which claims against the state must be presented for payment. In the case of State ex rel. Johnson v. Draper, 48 Mo. 56, l.c. 58 (decided in 1871), the court, in discussing the provision then in effect, which was the same at that time as that found in Section 13081, R. S. Mo. 1939, stated:

" * * * It is clear that the Legislature intended to limit the power of the auditor to recent and fresh claims, reserving to itself the power, if any strong equity should be shown in favor of an older one, to pass upon it by a special act."
(Emphasis ours.)

A recent discussion of the power of the Legislature in regard to claims against the state is found in the case of

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State ex rel. S. S. Kresge Co. v. Howard, 357 Mo. 302, 208 S.W. (2d) 247. That case involved an appropriation (Laws of Missouri, 1947, Vol. I, pages 175, 179, Section 9.061) for the relief of S. S. Kresge Company for payment of foreign corporation qualification tax which the corporation had paid prior to a decision of the Supreme Court holding that there was no liability to pay the additional tax. In the course of its opinion the court stated, 208 S.W. 1.c. 250:

" * * * The State itself, without intervention of judicial process which was not necessary under the circumstances, has seen fit to acknowledge its lawful obligation to relator by making the appropriation. And certainly the State may appropriate money for the payment of its lawful obligation unless, because of particular circumstances, there is some constitutional bar.

"Respondent contends the appropriation offends several constitutional provisions. Section 38 of Article III, Constitution 1945, Mo. R.S.A. denies the general assembly the power to grant public money or lend public credit to any private person or corporation. This prohibition does not apply to the appropriation to relator because it was in payment of a valid public obligation, and was not a grant or gift of public money. As was said in Re Monfort's Estate, 193 Minn. 594, 259 N.W. 554, 555, 98 A.L.R. 280, under a similar constitutional provision: 'There is nothing in the Constitution forbidding the state to recognize and pay its just debts.' State ex rel. Prairie v. Walker, 85 Mo. 41, is not apposite under the facts.

"Subsection (30) of Section 40, Article III forbids the passing of a special law where a general law can be made applicable. A general law would not be applicable here. An appropriation to pay a particular obligation to a particular obligee is not a proper subject for a general law. Such an appropriation is not comprehended as a special law under this section. But it is suggested there may be others who suffered the same

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illegal exaction of the domestication tax. The record before us does not disclose this fact. Even if there are, such fact does not affect the validity of the appropriation for the payment of relator's lawful claim. It may be assumed that the State will pay all its lawful obligations.

"Subsection (7) of Section 40, Article III, forbids the general assembly by local or special law from 'remitting fines, penalties and forfeitures or refunding money legally paid into the treasury.' The refund here is not by 'special' law. Furthermore this provision does not forbid refunding money paid into the treasury through illegal exaction as was done in this case.

"Section 28 of Article IV provides that no obligation for the payment of money shall be incurred unless the comptroller certifies it for payment. Section 22 of the same article makes the comptroller the director of the budget, and provides he shall preapprove all claims and accounts. Clearly these provisions are not intended as conditions precedent limiting the power and authority of the general assembly to make an appropriation. To the contrary, an appropriation by the general assembly appears to be a prerequisite for the duties to be exercised by the comptroller under these sections. Since a valid appropriation has been made it is the duty of the comptroller to act.* * * (Emphasis ours.)

That opinion, we feel, establishes the power of the General Assembly to recognize and pay a liability of the state in the absence of constitutional prohibition. It further rules aside any constitutional objections which might be made to the appropriations under consideration.

Insofar as the two-year statute is concerned, we feel that it would undoubtedly be considered by the court to be a limitation upon the Comptroller's power and not upon that of the Legislature. Recognition by the Legislature of a claim after the expiration of the two-year period would, in effect, amount to the reinstatement of the obligation just as the acknowledgment of an indebtedness after the expiration of the period of

Honorable E. L. Pigg

limitations avoids the operation of the statute of limitation.
54 C. J. S., Limitation of Actions, Section 304, page 370.

CONCLUSION

Therefore, this department is of the opinion that the Comptroller should pay claims made under appropriations for relief of county clerks for services in preparing and extending the tax books although the original claims for such services accrued more than two years previously, the appropriation by the Legislature having the effect of providing for the payment of such obligations despite the expiration of the original period within which the claims should have been presented to the Comptroller.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW:ml

C RIMINAL COSTS

) State liable for costs of proceedings in juvenile
) court only where defendant is convicted of
) offense for which ~~25~~ punishment is imprison-
) ment in the penitentiary *or death.*

March 6, 1950

3/8/50

Honorable E. L. Pigg
State Comptroller
Jefferson City, Missouri



Attention: O. L. Peters

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The 1947 Laws of Missouri, Volume 2, page 321 shows the repeal of Sections 8993 to 9012, inclusive of Revised Statutes of Missouri 1939 and the enactment of new sections relating to the control and regulations of State Training School for Boys and Girls.

"This department therefore desires an opinion from your office in regard to the question as to whether or not the State is liable, under the new law, for the costs of proceedings in either circuit court or juvenile divisions, in which the defendant or child is convicted of a crime and is sentenced or committed to the Missouri Training School for Boys, the Industrial Home for Girls, or the Industrial Home for Negro Girls.

"In other words is the State in any event liable for costs in any case in which the person is sentenced or committed to any of the above institutions, or is paroled or acquitted, or the case dismissed."

Section 8994, Laws of 1947, Volume II, page 320, provides

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in part as follows:

"(1) Any boy over the age of 12 years and under the age of 17 years and any girl over the age of 12 years and under the age of 21 years who has been convicted of a crime or who is found by the juvenile or circuit court to be in need of training school education and discipline may be committed to the state board of training schools. Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his 21st birthday, all commitments to the Board shall be made for an indeterminate period of time."

Section 9004, Laws of 1947, Volume II, page 320, provides:

"In all cases in which children are committed to the board of training schools, the juvenile officer shall deliver the children to the institution designated by the board, and shall be allowed the necessary expenses incurred in such delivery for himself and the child and in returning therefrom, to be paid by the county."

Section 9004, R. S. Missouri, 1939, now repealed, (Laws of Missouri, 1947, Volume II, page 320) provided:

"In all cases of conviction of felony, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the Missouri training school for boys shall be allowed the necessary traveling expenses of himself and such person, and

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a per diem of two dollars for the time actually occupied in taking such person to said Missouri training school for boys and in returning therefrom, to be paid by the state or county, as the case may be."

No new section was enacted by the Legislature following the repeal of Section 9004, R. S. Missouri, 1939, so that there is now no statute expressly covering the matter of costs on the proceeding resulting in the commitment of a person to the care of the State Board of Training Schools.

Section 9676, R. S. Missouri, 1939, applicable to proceedings in juvenile courts in counties having a population of over 50,000, provides in part:

" * * * On the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear the case in a summary manner, and if it shall determine that the child is a 'neglected child' within the definition thereof contained herein, shall enter its order or judgment accordingly under the provisions of this article; and the cost of the proceedings may, in the discretion of the court, be adjudged against the petitioner, or any person or persons summoned, or appearing as the case may be, and collected as provided by the law in civil cases. All costs not so collected shall be paid by the county. * * *"

Section 9703, R. S. Missouri, 1939, applicable to proceedings in juvenile courts in counties with populations of less than 50,000 contains a similar provision regarding costs. These sections are, however, applicable in proceedings in the juvenile court for the determination of the question of whether or not a child is a neglected child, and do not apply to proceedings under the criminal law which result in the commitment of a child to the State Board of Training Schools.

Section 4221, R. S. Missouri, 1939, (Amended Laws of 1945, page 844) provides in part as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases

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in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * *

Section 4223, R. S. Missouri, 1939, provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 4221, was originally enacted as Section 2829, R. S. Missouri, 1899. At that time the institution maintained by the state for the commitment of persons under the age of seventeen was known as "reform school." The present arrangement whereby such institution is known as the Missouri State Training School was adopted pursuant to Section 38, Article IV, Constitution of Missouri, 1945.

"Costs ordinarily may be imposed and recovered only in cases where there is statutory authority therefor, and only in the instances, to the extent and in the manner provided for by statute." (20 C.J.S., Costs, Section 2, page 259)

In the case of Cramer v. Smith, 350 Mo. 736, 168 S.W. (2d) 1039, at 1. c. 1040, the court quoted with approval from 20 C.J.S., Costs, Section 435, page 677, as follows:

"At common law, costs of such in a criminal case were unknown. As a con-

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sequence, it is the rule, as well in criminal as in civil cases, that the recovery and allowance of costs rests entirely on statutory provisions -- that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature and are to be strictly construed."

We are of the opinion that Section 4221, R. S. Missouri, 1939, imposes upon the state the liability to pay costs in criminal proceedings, in which, were the defendant over the age of seventeen years, the only punishment provided would have been imprisonment in the state penitentiary. We are further of the opinion that liability on the part of the state for costs in such proceedings exists only in such cases. Section 4223, R. S. Missouri, 1939, would not impose upon the state liability for costs upon the acquittal of a person charged with criminal offense, the sole punishment for which would have been imprisonment in the state penitentiary, had the defendant not been a person who might be committed to the custody of the State Board of Training Schools. In the case of State ex rel. Clarke v. Wilder, 94 S.W. 499, 197 Mo. 27, the Supreme Court held that under this section the state was not liable for the costs in the case of the acquittal of a person under the age of sixteen years in the juvenile court on a charge of murder in the second degree. The court held that inasmuch as the defendant in that case might have been committed to the state reformatory, commitment to the state penitentiary was not the only punishment for the offense of which he had been acquitted, and, therefore, Section 4223 did not impose liability for costs upon the state.

Liability is imposed upon the state, under Section 4221, upon conviction for the offense. The power of parole may not be exercised until there has been a judgment or sentence of punishment (Section 4200, R. S. Missouri, 1939, State v. Hockett, 129 Mo. App. 639, 644, 108 S.W. 599.) Therefore, liability for costs would be unaffected by parole.

CONCLUSION

Therefore, this department is of the opinion that the state is liable for costs of proceedings in juvenile court in which the defendant is convicted of an offense, for which, were he not a person who may be committed to the custody of the state

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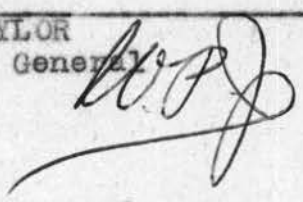
board of training schools, the only punishment provided would have been death or imprisonment in the state penitentiary, and that the state is not liable for costs in any other proceedings in juvenile court, whether the defendant be convicted of an offense for which imprisonment in the penitentiary is not the sole punishment, or whether the defendant be acquitted. Parole of the defendant does not alter the liability of the state.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General



RRW/feh

OFFICERS
LEGISLATURE

Person elected to fill vacancy in Legislature entitled to compensation from date of election.

FILED NO. 71

May 23, 1950



Honorable Elmer L. Pigg
State Comptroller
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In the special election on April 4th two representatives were elected to fill out unexpired terms.

"Article III, Section 15, of the constitution provides that 'the oath shall be administered in halls of the respective houses etc.'

"My question is: Can the oath be administered any time or will they have to wait until the General Assembly is in session?

"I would like to have your official opinion as to when these two representatives may legally qualify."

Section 15 of Article III of the Constitution of 1945 provides:

"Every senator or representative elect, before entering upon the duties of his office, shall take and subscribe the following oath or affirmation: 'I do solemnly swear, or affirm, that I will support the Constitution of the United States and of the State of Missouri, and faithfully perform the duties of my office, and that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.' The oath shall be administered in the halls of the respective

Honorable Elmer L. Pigg

houses to the members thereof, by a judge of the supreme court or a circuit court, or after the organization by the presiding officer of either house, and shall be filed in the office of the secretary of state. Any senator or representative refusing to take said oath or affirmation shall be deemed to have vacated his office, and any member convicted of having violated his oath or affirmation shall be deemed guilty of perjury, and be forever disqualified from holding any office of trust or profit in this state."

The elections to fill the vacancies which were held on April 4, 1950, were held pursuant to Section 14 of Article III, Constitution of 1945, which provides that writs of election to fill vacancies in either house of the General Assembly shall be issued by the Governor.

Section 15 of Article III, quoted above, is practically identical to Section 15 of Article IV of the Constitution of 1875. The 1875 Constitution, Section 16, Article IV, provided that the members of the General Assembly should be compensated on per diem basis for the sessions of the General Assembly. Consequently, under the 1875 Constitution, if a member of the General Assembly was to receive any compensation, there must of necessity have been a session of the Assembly.

Section 16 of Article 4 of the 1875 Constitution was amended on November 3, 1942, to provide that the members of the General Assembly shall receive a monthly salary of \$125.00 per month. The same provision is made by Section 16 of Article III of the Constitution of 1945.

The persons having been duly elected on April 4th to fill vacancies in the House of Representatives, the fact that the General Assembly is not in session so that the provisions of Section 15 regarding the place of taking the oath of office may not be complied with should not, we feel, deprive the person so elected of the compensation which the Constitution provides that he shall receive. The right of a public officer to the salary of his office is incident to the office, and he is entitled to such salary although he does not perform the duties thereof. (Luth v. Kansas City, 203 Mo. App. 110, 218 S.W. 901.)

As a general rule, constitutional provisions are regarded as mandatory not directory. (1 Cooley, Constitutional Limitations, page 159, 11 Am. Jur., Constitutional Law, Section 69, page 686) However,

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the courts of this state have recognized exceptions to the general rule insofar as the Missouri Constitutions have been concerned. In the case of *City of Cape Girardeau v. Riley*, 52 Mo. 424, the court considered the validity of an act which failed to follow the requirement of Article 4 of Section 26 of the Constitution of Missouri of 1865, that the style of laws enacted by the General Assembly shall be "Be It Enacted by the General Assembly of the State of Missouri As Follows:." The court in its opinion stated at l. c. 428:

"The enacting clause is certainly not of the essence of the law. It furnishes no aid in its construction, and its provisions are as clear and intelligible without it as they are with it. It is not material in indicating by what authority the law was enacted, for being passed in due form by both Houses of the Legislature and properly approved by the governor, with no allegation of suspicion attached to it, it comes before the courts bearing sufficient evidence that it is really and truly a law.

"To hold that a law supported by these sanctions was not valid because certain formal and immaterial words were omitted, would be sacrificing substance to mere form, which I think the court is not justified in doing."

Likewise, provisions requiring that all writs and processes run in the name of the state have been held merely directory, not mandatory. In the case of *Creason v. Yardley*, 272 Mo. 279, l. c. 285, the court stated:

"The foregoing authorities clearly hold that Section 38 of Article VI of our constitution (1875), requiring that all writs and processes shall run in the name of the state, is merely directory."

In the present situation the substantial matter involved is the taking of the oath. Refusal to take the oath results in disqualification to hold the office. We feel that the taking of the oath must be regarded as the mandatory provision, and that the place of taking the oath is, under the circumstances, directory only.

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CONCLUSION

Therefore, it is the opinion of this department that a person elected to fill a vacancy in either house of the General Assembly at a time when the General Assembly is not in session may qualify upon his taking the prescribed oath of office and filing the same in the office of the Secretary of State, and that the oath need not be administered in the halls of the General Assembly.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS: At special election for sheriff candidates may be nominated by political committees or petitions;
SHERIFFS: conventional ballot to be used; names of candidates must be published at least seven days before election; precinct judges and clerks to be same as at general election.

November 16, 1950

11-16-50

Mr. David P. Plummer
Clerk of the County Court
Clinton County
Plattsburg, Missouri



Dear Sir:

This in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

"By an order of Record, the County Court of Clinton County has ordered me to ask your office for an opinion on the following questions:

"In filling the vacancy existing in the office of the Sheriff of Clinton County, Missouri, caused by the death of former Sheriff, Charles Wamsley, on November 5, 1950, the Court has ordered a special election for December 2nd, 1950;

"1. What is the latest date a candidate may file his declaration with the Clerk and what is the proper procedure of filing;

"2. What form of ballot should be used;

"3. When and for how long should the clerk publish copy of the ballot;

"4. Must the precincts at said Special Election be the same as at the regular elections, or may the Court reduce the number;

"5. Shall the same number of judges and clerks be appointed for the special election, or may the election be held with a smaller number?"

Mr. David P. Plummer

Section 13143, R.S. Mo. 1939, relative to vacancy in the office of sheriff of a county, provides, in part, as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; * * * Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, and if there should be no newspaper published in said county, shall then give notice, by ten written handbills, posted up in ten of the most public places in the county, for twenty days prior to the day of holding such election. Upon the occurrence of such vacancy, it shall be the duty of the presiding justice of the county court, if such court be not then in session, to call a special term thereof, and cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

It is to be noted that such section provides that the election is to be held in pursuance of the provisions of such section and the election laws regulating general elections. The present provisions in law relative to making nominations by party committees are found in Section 11539, Laws of Missouri, 1941, page 354, and Section 120.55, House Bill No. 2057, 65th General Assembly, which sections provide:

Sec. 11539. "The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between conventions of the

Mr. David P. Plummer

party. That for the purpose of making nominations to fill vacancies resulting from death or resignation and not otherwise, on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. That a central committee shall not have the power to delegate its authority to make nominations to any person or number of persons, and that any act consequent upon any such delegation of authority shall be held to be null and void. That no central committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted."

Sec. 120.55. "When a vacancy, occurring in the nominations after the holding of any primary, has resulted from the death or resignation of a nominee of the party who was selected at such primary or when a vacancy in office occurs after the last Tuesday in April and before the general election held in the same year, which vacancy is to be filled for the unexpired term at such general election, the party committee of the county, district or state, as the case may be, shall have authority to make nominations to fill such vacancies. Nominations to fill such vacancies shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination or with the board of election commissioners or county clerk not later than ten days before such election. No names shall be allowed on any ticket until the required fee has been paid."

While such sections do not specifically provide for the nomination by party committees of candidates for the office of sheriff at a special election, we believe that the provision in Section 11539, stating that the central committee of a political party represents and acts for the party in the interim between

Mr. David P. Plummer

conventions of a party, gives to such committee the power to make nominations for such office under our system of holding elections. In the case of State ex rel. Hayden v. Thomas, 182 S.W. (2d) 584, the Supreme Court said, l.c. 586:

" * * * * Our laws recognize political parties as useful adjuncts to our system of government. Accordingly, while preserving the right of candidates to run for office independently, we have enacted laws regulating nominations by political parties. It is the policy of those laws to require party nominations to be made by the electors of the party where possible, but we do not think the law prevents a political party from making nominations by its duly constituted committee when it has had no opportunity to make them by its electors at the regular primary. In other words, the state primary law is inapplicable to nominations for vacancies in office occurring too late to be voted on at the state primary. Formerly such vacancies were filled at special elections and nominations therefor were made by or under the direction of party committees. Under present statutes such vacancies are filled at the next general election, but Section 11546 still provides that the state primary law 'shall not apply to special elections to fill vacancies.' Considering all the statutes mentioned, we think the state primary law provides the method for nominations to all offices to be filled at the ensuing general election, except as to vacancies occurring too late to be voted on at the state primary."

We believe that under the doctrine of this case nominations by political parties are to be made at all elections, and that the county committees of the political parties presently existing in Clinton County are entitled to make nominations for such office.

The provisions for making nominations by electors' petitions are found in Sections 120.01, 120.03 and 120.06, House Bill No. 2057, 65th General Assembly. Such sections provide as follows:

Mr. David P. Plummer

Sec. 120.01. "Electors may nominate candidates for public offices to be filled by election within the state. Such nomination shall be made by filing a certificate of nomination executed with the formalities prescribed for the execution of an instrument affecting real estate."

Sec. 120.03. "The certificate of nomination shall be signed by a number of electors, resident within the district or political division for which the candidate is presented, equal to two per cent of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made. The signers shall declare in the certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

Sec. 120.06. "Certificates of nominations filed with the secretary of state shall be filed not more than ninety and not less than seventy days before the day fixed by law for the election of the person in nomination. Certificates of nomination herein directed to be filed with the clerk of the county court of each county shall be filed not more than ninety days and not less than seventy days before election."

While it is true that Section 120.06 provides that the certificates of nomination are to be filed with the clerk of the county court not more than ninety and not less than seventy days before election, we believe that any filing by such candidate may be made at any time until the publication of a list of candidates must be made by the county clerk. The date upon which the clerk must publish the list of candidates for an office is found in Section 11542, R.S. Mo. 1939, which makes such period seven days before an election. The nominations by the party political committees must also be certified to the county clerk at least seven days before the election so that the county clerk may be able to publish the names of the candidates as required by Section 11542.

Mr. David P. Plummer

The ballot used should be that prescribed by Section 111.42, House Bill No. 2049, 65th General Assembly, which provides, in part, as follows:

" * * * The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, * * * Each list of candidates shall be placed on the ballot in the order of the voting strength of the respective parties as determined by the vote for governor at the last preceding general election; the party receiving the highest number of votes for governor at such election to be placed in the first or left-hand column, the party receiving the next highest number of votes as herein described shall be placed in the next to the right or second column; this order to continue till all have been placed. Those lists of candidates nominated by petitioners or which have no determining vote as herein described shall be placed on the ballot to the right of those determined by previous elections as herein designated, in such order as may be determined by the election officials or clerk of the county court whose duty it is to print such ballot. At the top on the face of the ballot shall be printed the words 'official ballot' followed by the designation of the date of the election. The ballot shall be plain white paper, through which the printing or writing cannot be read. The party name shall be printed in capital letters, not less than 18-point in size and a circle one-half inch in diameter shall be printed immediately below the line in which such party name is printed. The names of candidates shall be printed in capital letters not less than 8-point in size nor more than 10-point size and at the beginning of each line in which the name of a candidate is printed a small square shall be printed, the sides of which shall not be less than one-fourth of an inch in length. The list of candidates of the

Mr. David P. Plummer

several parties and groups of petitioners shall be placed in separate columns on the ballot, with a heavy perpendicular line between each list, in such order as is provided for in this section. * * * "

We find no provision in the statutes for consolidating or reducing the number of precincts for a special election for sheriff. We find no provision for using a different number of judges and clerks for this special election, and since the law provides that it shall be held in pursuance of the election laws regulating general elections in the state, it will be necessary to follow the provisions of a general election law with regard to the number of judges and clerks.

CONCLUSION

It is the opinion of this department that:

1. The county committees of the existing political parties in Clinton County may nominate candidates for sheriff at the special election to be held for such office December 2, 1950.
2. Candidates may be nominated for such office by petition signed by two per cent of the voters, and nominations by petitions and by the committees of the political parties may be made at any time prior to the date the names of the candidates must be published by the County Clerk. The nominations so certified to the Clerk must be published at least seven days before the election date.
3. The form of ballot is that prescribed by Section 111.42, House Bill No. 2049, 65th General Assembly.
4. The County Court has no authority to consolidate precincts for such special election.
5. The same number of judges and clerks are to be appointed for such election as are appointed at the regular general elections.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

C. B. BURNS, JR.
Assistant Attorney General

CBB:ml

ELECTIONS: Where sheriff dies within nine months preceding
general election, successor is to be elected at
SHERIFF: such general election, and special election
cannot be held.

November 21, 1950



Mr. David P. Plummer
Clerk
Clinton County
Plattsburg, Missouri

Dear Sir:

This is in answer to your letter of recent date
requesting an official opinion of this department, reading
as follows:

"In filling the vacancy existing in the
office of the Sheriff of Clinton County,
Missouri, caused by the death of former
Sheriff, Charles Wamsley, on November 5,
1950, the County Court did by an order
of record, dated November 6, 1950, appoint
J. C. Walkup Sheriff to fill the vacancy,
and ordered a Special Election to be
held on December 2, 1950, for the pur-
pose of electing a Sheriff.

"It was called to the attention of the
County Court that it was doubtful that
they had authority for calling said
Special Election; therefore by an order
made November 20, 1950, the Court rescinded
the order calling the Special Election and
ordered me to request your office whether
or not they have authority to order a
Special Election for the purpose of
electing a Sheriff."

Section 13143, Revised Statutes of Missouri, 1939,
provides in part as follows:

"Whenever from any cause the office of
sheriff becomes vacant, the same shall
be filled by the county court; if such
vacancy happens more than nine months

November 21, 1950

prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; * * *

Section 120.55, House Bill No. 2057, 65th General Assembly, provides as follows:

"When a vacancy, occurring in the nominations after the holding of any primary, has resulted from the death or resignation of a nominee of the party who was selected at such primary or when a vacancy in office occurs after the last Tuesday in April and before the general election held in the same year, which vacancy is to be filled for the unexpired term at such general election, the party committee of the county, district or state, as the case may be, shall have authority to make nominations to fill such vacancies. Nominations to fill such vacancies shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination or with the board of election commissioners or county clerk not later than ten days before such election. No names shall be allowed on any ticket until the required fee has been paid."

Section 120.56, House Bill No. 2057, 65th General Assembly, provides in part as follows:

"When any vacancy, which may be filled by a candidate nominated by a party committee pursuant to section 120.09 or section 120.55, occurs too late to

November 21, 1950

permit the committee to file its nomination within the time prescribed in such sections, the chairman of the party committee of the county, district or state, as the case may be, is hereby empowered to make a nomination to fill such a vacancy. The chairman shall make an affidavit covering all the facts before the judge of some court of record, who shall, under his hand and the seal of the court, grant a certificate covering the facts, which certificate shall be filed with the secretary of state, county clerk or board of election commissioners. If with the secretary of state, the secretary of state shall immediately notify the various county clerks and boards of election commissioners of the vacancy. Whenever the county clerks or boards of election commissioners are duly notified of a vacancy in the manner provided by law, it shall be their duty forthwith to have printed small pasters, suitable for covering the name or names to be stricken out, containing in plain letters the name or names to be substituted. The county clerks or boards of election commissioners shall see to it that these pasters are properly applied to the tickets before they are placed in the hands of the voters, if necessary by having the pasters conveyed to the judges of election with instructions to paste them over the name or names to be stricken out before the tickets are delivered to the voter. Should the county clerks or boards of election commissioners receive the notification herein provided for in time to do so, they shall have the proper correction made on the ticket while it is still in the hands of the printer. Should the exigency of time be so great as to require it, notice of the vacancy and of the compliance with this section by the chairman of the political party

Mr. David P. Plummer

November 21, 1950

may be conveyed to the secretary of state, county clerk or board of election commissioners by telegraphic message, to be followed by the filing of the papers. The secretary of state, county clerk or board of election commissioners shall proceed immediately upon receipt of such telegram to take action as though the papers were already filed, and county clerks and boards of election commissioners shall in a similar manner act upon a telegraphic notice from the secretary of state."

The two above quoted sections of House Bill No. 2057 provide for the nomination in the situation where a vacancy in office occurs after the last Tuesday in April and before the general election to be held the same year, and, therefore, provide the method by which nominations should have been made for the office of sheriff of Clinton County to be voted on at the general election of 1950.

We are enclosing a copy of an official opinion of this department rendered under date of April 24, 1947 to Mr. Clinton Lindley, holding that elections may be held only as provided by law. Since the sheriff of Clinton County died less than nine months before the general election of 1950, such general election was the proper election at which his successor should have been chosen. A special election may be called for the election of a sheriff only where the vacancy in the office happens more than nine months preceding a general election. Since the vacancy in the office of sheriff of Clinton County happened less than nine months before the general election of 1950, there is no authority in law for the holding of a special election to elect his successor.

CONCLUSION

It is the opinion of this department that the county court of Clinton County, Missouri, has no authority to order a special election for the office of sheriff to fill the vacancy created by the death of the sheriff of Clinton County on November 5, 1950.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General
CBB:lrt

ELECTION BOARD:

Assistant election commissioner properly appointed to position when the meeting attended by four members of election board, two voted in favor of such assistant, one voted against and one did not vote.

March 29, 1950



Honorable David M. Proctor
City Counselor
City Hall
Kansas City 6, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"I am enclosing herewith transcript of a portion of an opinion which I gave to Mr. Agard, Director of Finance, relative to certain warrants of the Election Commissioners for salaries. The opinion is dated July 15, 1949.

"I should like to have at your very earliest convenience the opinion of your office regarding the appointment of Edna M. Cole. If she was lawfully appointed, the city of course will no doubt pay her the salary that has accumulated since her appointment."

The transcript of the portion of the opinion which you enclose holds that where an assistant election commissioner was purportedly appointed at a meeting of the Kansas City board of election commissioners, at which meeting two members voted in favor of such appointment, one member voted against such appointment and one member did not vote, the appoint was void.

You also state in your letter that a California case and the case of Bonsack & Pearch v. School Dist. of Marceline, 49 S.W.2d 1085, decided by the Kansas City Court of Appeals, have been cited as bearing upon the validity of such appointment

Section 12097, Revised Statutes of Missouri, 1939, which section is applicable to Kansas City, Missouri, provides in part as follows:

Honorable David M. Proctor

"There is hereby created a board of election commissioners for each city that is governed by the provisions of this article, composed of four members.

"Said board shall have the right to employ such assistants, clerks, stenographers, typists, or other employees, equally divided between the two parties to which the election commissioners belong, from time to time as may be necessary promptly and correctly to perform the duties of office under the direction of the board."

Section 12098 provides in part as follows:

"Any two members of the board of election commissioners shall have power to appoint before or upon any day of registration or election such number of deputy commissioners, who must be qualified voters in the city, as they may deem necessary, to be divided equally between the two political parties for the purpose of taking a census of and ascertaining the facts and conditions relative to the residence and voting right of persons in any election precinct or precincts; and to attend and be present at and during any registration, revision of registration or election, to witness and report to the board of election commissioners any failure of duty or any fraud or irregularities occurring thereat; and to act as judges or clerks in any precinct in place of absent, removed, or disqualified judges or clerks; and to do and perform any and all acts which the said board or any two members thereof shall direct."

The general rule with regard to the actions of a board such as the election board in this case, is found in the case of Collins v. Janey, 249 S.W. 801, decided by the Supreme Court of Tennessee. In that case the court was ruling upon the validity of the action of a school board. The court said l.c. 803:

"At a full meeting of the board on August 9, 1921, the contract in question was read and discussed, and, upon a motion to adopt it, three of the members voted 'Aye,' two 'No,'

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and two did not vote. It was declared adopted, and the chairman was directed to execute same on behalf of the board, which he failed and refused to do, upon the theory, as claimed by him, that it was invalid unless assented to by a majority of the members of the board.

"Was the contract lawfully entered into; that is, did it receive a sufficient number of votes to validate it? A majority of those voting approved it, but a majority of those present did not affirmatively assent to it.

"By chapter 120 of the Public Acts of 1921, said board of education for Marion county was created. The act is silent as to the number of members of the board necessary to constitute a quorum, or the number of votes necessary to pass a measure.

"Under the common law a majority of such a board constituted a quorum. The question here involved is how many votes are necessary to pass a measure where a quorum is present? Ordinarily it would require a majority of the quorum. But what is the rule where one or more who are present refuse to vote - is a majority of those actually voting sufficient to validate the measure under consideration?

"In 28 Cyc. 339, the author says:

"'As a general rule, the number of lawful votes actually cast decides the question; so that it is generally held that, if a quorum is present, an election or measure is determined by the majority of the votes actually cast, although an equal or even a greater number refuse or fail to vote.'"

Since there is no provision in Chapter 76, Article 23, Missouri Revised Statutes Annotated, stating the specific number of the election commissioners constituting a quorum or any provision requiring any certain number more than a majority of a quorum to act as a board of election commissioners, we believe the rule set forth in the Janey case to be applicable, and hold that where the Kansas City board of election commissioners had a quorum of its

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members present and a majority of those voting, which number constituted a quorum, voted for the appointment of Edna M. Cole as an assistant election commissioner, that her appointment was valid.

We believe that the quoted provision of Section 12098, supra, stating that any two members of the board of election commissioners shall have power to appoint before or upon any day of registration or election such number of deputy commissioners, who must be qualified voters in the city, as they may deem necessary, is a provision giving to two individual members of the election board power to appoint deputy commissioners, and is not a statute stating what the board of election commissioners can do. Under the quoted provisions of Section 12098 any two of the commissioners may make appointments of deputy commissioners, and such appointments need not be made by the board at a board meeting, but under the provisions of Section 12097 the board must employ assistants, clerks, stenographers, typists or other employees, except deputy commissioners.

Therefore, we do not believe that Section 12098 is relevant in determining the question of whether or not a majority of the members of the quorum of the election board voting may bind such board.

The case of *Bonsack & Pearce v. School Dist. of Marceline*, 49 S.W. 2d 1085, holds that where members of a board are present at a meeting it is the duty of such members to vote upon all questions that may arise and that where a member fails to vote, the vote of such person is counted with the majority. The court said in that case, 1.c. 1088:

"Five of the six members of the school board were present and by their presence constituted a quorum, and it became and was the duty of each and every member to vote for or against any proposition which was presented to them. If, under such circumstances, a member does not respond when his vote is called for, but sits silently by when given an opportunity to vote, he is regarded as acquiescing in, rather than opposing, the measure, and is regarded in law as voting with the majority. Such is the rule announced in many authorities."
(Citing authorities,)

However, we believe that the holding of the Kansas City Court of Appeals in this case is overruled by the holding of the Supreme Court in the case of *State ex rel. v. Becker*, 81 S.W. 2d 948. In that case the Supreme Court held that the appointment of a cousin of one of the judges of the St. Louis Court of Appeals did not violate the nepotism provision of the constitution so long as the related judge did not vote for his cousin. The court said 1.c. 950:

Honorable David M. Proctor

"Action, direct or indirect, not inaction
is prohibited."

The court further said l.c. 951:

"Now, in the instant proceeding, it is freely conceded that in the intended appointment there is no fact or in semblance any connivance, agreement, confederation, or conspiracy between the majority members of the Court of Appeals as between themselves or as between them, on the one hand, and the non-voting member on the other, or any common design between any two of them, that the two should accomplish in behalf of any or all a prohibited purpose." (Emphasis ours.)

We believe that the Becker case affirmatively recognizes the power of a member of a board to decline to vote and that such case, therefore, overrules the holding of the Marceline School District case insofar as non-voting members of the board are concerned.

CONCLUSION

It is the opinion of this department that an assistant election commissioner was validly appointed at a meeting of the four members of the Kansas City election board, where two members voted for the appointment of such assistant, one voted against the appointment of such assistant, and one member did not vote.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED BY:

J. E. TAYLOR
Attorney General

LIBRARY:
STATE AID:

(a) The power and authority of St. Joseph, Missouri to levy a tax for public library purposes is governed by Laws of Missouri, 1945, page 1287,

Section 1a. (b) Section 1a, Laws of Missouri, 1945, page 1287 authorizes the City Council of St. Joseph, Missouri to levy a maximum of three mills on the dollar for library purposes by a legal vote.

(c) Figures presented do not comply with alternate standard (1), Laws of Missouri, 1945, page 1134.

September 26, 1950



Mr. Paxton P. Price
State Librarian
Jefferson City, Missouri

Dear Sir:

This will acknowledge your letter of recent date requesting an opinion of this department. Your letter, in part, reads as follows:

"We would like to have an opinion by your office on the interpretation of the law as regards the following case.

"The State Library, under the commission and authority granted it by the Laws of 1945, Section 14736a, page 1134, appropriates state aid monies to public libraries according to:

"and provided further after January 1, 1949 grants shall be made to any public library according to two alternate standards: (1) to any public library in which the tax rate is one-half or more of the maximum by law; or (2) to any public library for which the tax income yields one dollar (\$1.00) or more per capita for the previous year according to the population of the latest Federal Census."

"The City of St. Joseph has applied for sharing in this state aid for public libraries. St. Joseph is a city of the first class whose library was established and is maintained under

Mr. Paxton P. Price

the authority granted it by Sections 6500 to 6509 inclusive, of the 1939 Revised Statutes, further amended and revised in part by H.B. 489, Laws, 1945, page 12867.

"The original law makes no provision for taxation for support of the library, but the 1945 amendments provide for the assessment of taxes for library, hospital, and recreational purposes establishing a limit of three (3) mills for the combined group.

"The City of St. Joseph does not levy a tax specifically designated as a library tax and the application received from the St. Joseph Public Library reveals that it receives an annual appropriation from the city council of \$59,000.00."

Attached to your opinion request are two sheets executed by officers of the St. Joseph, Missouri Public Library; also a letter addressed to your department signed by Senator Francis Smith, St. Joseph, Missouri, concerning the rights of the St. Joseph Public Library to state aid according to the applications made. From such applications it appears that the population of St. Joseph, Missouri, according to the 1940 Federal Census, is 75,711. Since that population is referred to in the report, we accept it as the basis of this opinion. We also understand from your letter and statements in the letter written by Senator Francis Smith that a library tax, as such, was not levied by the City Council of St. Joseph, Missouri for the purpose of, or in raising the \$59,000 appropriated by the Council for public library purposes.

Section 14736a, Laws of Missouri, 1945, page 1134, in part reads as follows:

"* * * At least 50 per cent of the moneys appropriated for state aid to public libraries shall be apportioned to all public libraries established and maintained under the provisions of the library law or other laws of the state relating to libraries. The allocation of such moneys shall be based on an equal per capita rate for the population of each city, village, town, township, school district, county, or regional library district in which any such library is or may be established, in proportion to the population according to the latest Federal Census of

Mr. Paxton P. Price

such cities, villages, towns, townships, school district, county or regional library districts maintaining tax supported public libraries, Provided, that no grant shall be made to any public library if the rate of tax or the appropriation for said library should be decreased below the rate in force at the time of the enactment of this bill into law and provided further after January 1, 1949 grants shall be made to any public library, according to two alternate standards: (1) to any public library in which the tax rate is one-half or more of the maximum by law; or (2) to any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest Federal Census. The librarian of such tax supported library together with the treasurer of such library shall certify to the State Librarian the annual tax income and rate of tax or the appropriation of said library on the date of the enactment of this bill, and of the current year, and each year thereafter, and the State Librarian shall certify to the Comptroller for his approval the amount to be paid to each library and warrants shall be issued for the amount allocated and approved. The balance of said moneys shall be administered and supervised by the State Librarian to provide establishment grants on a population basis to newly established county or regional libraries and equalization grants on a population basis to county or regional libraries in all districts in which a one-mill or more tax does not yield a dollar per capita to said libraries, and provided further that only a library in a municipality, city, county, region, school district or other library district serving 5,000 or more population established by law after January 1, 1947, shall receive grants in aid. * * *
(Underscoring ours)

We are putting aside for the present the question of whether or not any public library not tax supported is entitled to state aid under Laws of Missouri, 1945, page 1132 and subsequent pages.

(1) We are of the opinion that the right of the City Council of St. Joseph, Missouri to levy a tax for public library purposes is governed and controlled by Section 1a, Laws of Missouri, 1945, page 1287, which in part reads:

Mr. Paxton P. Price

"In addition to the levies as provided for in Section 1 of this Act all cities of the first class are hereby authorized to levy annually not to exceed thirty cents in the aggregate on the one hundred dollars assessed valuation upon all property subject to its taxing powers for any one or more of the following purposes: li-
brary, hospital, public health, recreation
grounds and museum purposes, when such rate
and purpose of increase are submitted to a
vote of the qualified electors within such
cities and a majority voting thereon shall
vote therefor. * * *" (Underscoring ours)

This section requires an affirmative vote by a majority of the qualified electors within cities of the first class in order to authorize the collection of the tax provided by the last quoted section. It will be noted that the above Section 1a authorizes an annual levy not to exceed thirty cents on the one hundred dollars assessed valuation for any one or or more of the purposes named, among which is library. It is apparent from this section that the City Council of St. Joseph could, if authorized as provided in above Section 1a, levy three mills on the dollar for its library purposes alone, or it may spread that amount over five different purposes in the aggregate. That being true, even accepting the figures as proposes, it does not constitute a tax rate which is one-half or more of the maximum permitted by law, as required by alternate standard (1), Laws of Missouri, 1945, page 1134.

(2) The population of St. Joseph, as shown by the application for state aid, being 75,711, of course the appropriation of \$59,000 for library purposes would not be in compliance with alternate standard (2), as required by Laws of Missouri, 1945, page 1135.

CONCLUSION

It is the opinion of this department that:

(a) The power and authority of St. Joseph, Missouri to levy a tax for public library purposes is governed by Laws of Missouri, 1945, page 1287, Section 1a.

(b) Section 1a, Laws of Missouri, 1945, page 1287 authorizes the City Council of St. Joseph, Missouri to levy a maximum of three mills on the dollar for library purposes by a legal vote.

(c) Figures presented do not comply with alternate standard (1), Laws of Missouri, 1945, page 1134.

Mr. Paxton P. Price

We are returning with this opinion the Application for State Aid by the St. Joseph Public Library, and papers connected therewith.

Respectfully submitted,

GILBERT LAMB
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DIVISION OF MENTAL DISEASES:
CONTRACT WITH MUNICIPALITIES
FOR LABORATORY SERVICES:

The Division of Mental Diseases
can enter into a contract with
the City of St. Louis for the
furnishing of laboratory and
post-mortem services to the St.
Louis State Hospital.

January 5, 1950



Mr. B. E. Ragland, Director
Division of Mental Diseases
Department of Public Health and Welfare
Jefferson City, Missouri

Dear Mr. Ragland:

We have your recent letter in which you request reconsideration of an opinion rendered earlier by this office. Your letter is as follows:

"On May 27, 1949, you rendered an opinion to Dr. Orr Mullinax, Director, Division of Mental Diseases, Jefferson City, Missouri. This opinion was in answer to the following questions:

"(1) Can the Division of Mental Diseases enter into a contract with the Board of Education of the City of St. Louis to furnish the services of teachers to the St. Louis State Training School?

"(2) Can the Division of Mental Diseases contract with the City of St. Louis for furnishing of such laboratory and post-mortem services as said City has heretofore furnished the City Sanitarium?

"(3) Can the Division of Mental Diseases contract with the City of St. Louis for services of interns and resident physicians of the City Hospital of the City of St. Louis?

"Dr. Louis H. Kohler, Superintendent of the St. Louis State Hospital, recently requested that you reconsider the above mentioned opinion."

Mr. B. E. Ragland

We have thoroughly reconsidered this request and after an exhaustive study, have determined that the conclusions reached in the opinion of May 27, 1949, insofar as they relate to contracts for the services of teachers and physicians are correct. That is, the Division of Mental Diseases cannot enter into a contract with the Board of Education (of St. Louis) to furnish teaching services for the St. Louis Training School; nor can said Division contract with the City of St. Louis for the services of interns and resident physicians of the St. Louis City Hospital to be rendered to the St. Louis State Hospital.

However, the third question proposed (No. 2 in your letter) is whether the Division of Mental Diseases may contract with the City of St. Louis for the furnishing of such laboratory and post-mortem services as said city had heretofore been furnishing the City Sanitarium. When the opinion of May 27th was written, from the information at hand, it then appeared that the contemplated arrangement between the Division and the City would not, as to laboratory services, be essentially different from the proposed agreement as to teachers and doctors, and therefore this department ruled that it would be equally improper to make a contract for the furnishing of laboratory services. When we received the request for reconsideration, in order to give the fullest possible consideration to said request, we asked for and received a comprehensive report on the exact procedure regarding laboratory services that had been followed when the Hospital belonged to the City of St. Louis. That report contained the following letter from the Superintendent of the St. Louis State Hospital:

"Snodgras Laboratory is located at the St. Louis City Hospital. It is a separate and distinct department in the Hospital Division of the City of St. Louis and has its own Director, who at present is Dr. John A. Saxton, Jr. In accordance with the rules and regulations of the Hospital Division of the City of St. Louis, Snodgras Laboratory performs special clinical laboratory tests, surgical specimen examinations and post-mortem examinations for all the hospitals of the City of St. Louis.* This of course included the St. Louis State Hospital which prior to July 19, 1948 was known as the City Sanitarium. Because our own laboratory is not equipped to do special laboratory tests, examinations of surgical specimens and post-mortem examination, Snodgras Laboratory has continued to supply these services on the basis of those arrangements that existed prior to the transfer of our hospital to State control.

Mr. B. E. Ragland

"Each day except Sunday, a messenger from our hospital delivers specimen material with written requests for special laboratory tests to Snodgras Laboratory. The tests are performed at the Snodgras Laboratory by their technicians, and a written report of the findings is returned to our hospital.

"In the case of post-mortem examinations, the procedure is as follows: After our Medical Staff has secured an autopsy permit, Snodgras Laboratory is informed that a post-mortem examination has been scheduled. The Director, Dr. John A. Saxton, Jr., sends two physicians from his department who are pathologists to perform the autopsy which is done at the St. Louis State Hospital Morgue in the presence of those members of our Medical Staff who are interested in the case. These pathologists take with them specimens of certain organs which have been involved in the cause of death. These specimens are fixed and prepared for examination at Snodgras Laboratory and later a report of the findings is sent to us. This report is incorporated in the patient's history.

*Hospitals operated by the Hospital Division of the City of St. Louis.

"The individuals who perform the above services for the St. Louis State Hospital are members of the Department of Snodgras Laboratory and all are employed by the City of St. Louis. No particular group is assigned to handle only those requests which are made for services by the St. Louis State Hospital."

It clearly appears, then, that there is no essential or important distinction between the State Hospital contracting with a private laboratory for the furnishing of certain laboratory tests and with the State Hospital contracting for laboratory and post-mortem services to be furnished by the City of St. Louis. It is equally clear that the procedure connected with the laboratory and post-mortem services would, when it becomes the subject matter of a contract, constitute a contract for the rendering of services rather than one of employment.

Mr. B. E. Ragland

Taking into consideration then, the new information revealed by the above letter, it is our opinion that the objections to a contract for the services of teachers and physicians expressed in the former opinion are not applicable to a contract for the furnishing of laboratory and post-mortem services.

CONCLUSION

It is the opinion of this department that the Division of Mental Diseases can properly contract with the City of St. Louis for the furnishing of such laboratory and post-mortem services to the St. Louis State Hospital, as said City has heretofore furnished the City Sanitarium.

Respectfully submitted,

H. JACKSON DANIEL
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SHERIFFS:
STATE HOSPITALS
FOR THE INSANE:

A county is not liable for the compensation of the sheriff for returning an insane person who escapes from a state hospital.

January 18, 1950

Honorable B. E. Ragland
Director, Division of Mental Diseases
State Office Building
Jefferson City, Missouri

FILED

73

Dear Sir:

I.

This office acknowledges the receipt of the following request from you for an official opinion:

"We have had several inquiries from sheriffs relative to the expense incurred in returning patients to the state hospital from which they escaped. Some of the sheriffs contend that under the new constitution the county bears the expense.

"Will you please advise whether or not the county is liable for this expense?"

Section 9354, R. S. Mo. 1939, provides:

"Should any insane person escape from any state hospital and return to the county from which he was committed, it shall be the duty of the sheriff of said county, upon being notified by the superintendent, forthwith to apprehend him and take him back to the hospital; and the sheriff shall be paid by the steward of the hospital, by order of the superintendent, the same fees as are provided in other cases for the commitment of insane persons to the hospital. No patient who has committed homicide shall be discharged without the consent of the superintendent and the written admission of a majority of the board of managers."

Section 9355, R. S. Mo. 1939, provides:

Hon. B. E. Ragland

"To the Sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and \$1.00 per day for the support of each patient on his way to or from the hospital shall be allowed; to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting under the warrant of the clerk, \$4.00 per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled: Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasury of the proper county."

The above quoted statutes have not been repealed by the Legislature of Missouri and are still in force and effect.

The case of Maxwell v. Andrew County, 146 S.W.(2d) 621, considers the question of the fees and mileage that the sheriff may charge the county and holds:

"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. Gammon v. Lafayette County, 76 Mo. 675; State ex rel. Evans v. Gordon, 245 Mo. 12, 149 S.W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; Jackson County v. Stone, 168 Mo. 577, 68 S.W. 926; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S.W. 504; Bates v. City of St. Louis, 153 Mo. 18, 54 S.W. 439, 77 Am. St. Rep. 701; Williams v. Chariton County, 85 Mo. 645. In this connection we may point out in passing that the sheriff's deputies are public officers who perform the duties and are subject to the liabilities

Hon. B. E. Ragland

imposed upon the sheriff himself by law. Scott
v. Endicott, 225 Mo. App. 426, 38 S.W.(2d) 67."

Since your division is charged with the responsibility of safely keeping and caring for the indigent insane persons of this county by the laws of this state, it is your responsibility to recover and return any escaped patients from the state hospitals. We can find no statutory provision for the payment of the sheriff by the county for returning patients who have escaped from the state hospitals.

Since Section 9354 expressly provides for the payment of the sheriff for returning escaped patients of any state hospital, the superintendent of the hospital, where the escaped insane person had been confined, shall pay the sheriff for returning such person as required by said section. The rate or amount of compensation to be paid the sheriff by the State Hospital is determined by Section 9355, R. S. Mo. 1939.

III.

CONCLUSION

It is the opinion of this office that a county is not liable for the compensation of a sheriff for returning an insane person who escapes from any state hospital. The sheriff shall be paid by order of the superintendent of the hospital from which the person escaped in accordance with the provisions of Section 9354, R. S. Mo. 1939. The amount of compensation to be paid the sheriff is governed by Section 9355, R. S. Mo. 1939.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

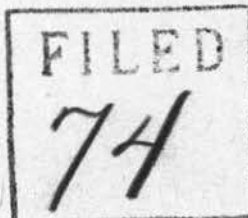
J. E. TAYLOR
Attorney General

SJM:mw

DRAINAGE DISTRICTS) Warrant bears interest from date of presentment
) and non-payment. Provision for interest from
) date non-effective.

January 19, 1950

1/20/50



Honorable Harry J. Revercomb
The State Senate
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department,
which request is as follows:

"I would like to have an official opinion
from your office on the following set of
facts.

"You are doubtless familiar with the drain-
age district warrants issued in Southeast
Missouri counties. A sample of such a war-
rant is:

No. _____ The Treasurer of The

COUNTY OF _____
State of Missouri

PAY TO _____ DOLLARS

Out of any money in the Treasury appropria-
ted for Drainage District No. _____

Given at the Court House in _____, Mo.,
this day of _____

By Order of the County Court

ATTEST:

Clerk

President

"In some instances such a warrant has stamped
upon its face the words

Honorable Harry J. Revercomb

'This warrant to draw interest from date at the rate of six per cent per annum.'

"In case such warrants are protested they have stamped upon the back the words

'The within warrant presented for payment and no money in the Treasury for this purpose.'

January 15, 1949

County Treasurer'.

"Our question is

'When such a warrant is paid to the holder is interest paid from the date of issue or from the date of protest?'"

Section 12474, R. S. Missouri, 1939, provides:

"The law of this state, under which county warrants are issued, sold, transferred, assigned, presented for payment, and paid, shall apply to all warrants issued by any drainage or levee districts in Missouri organized under any existing, special or future law of this state."

The law has been long established in this state that county warrants draw interest from the date of presentment for payment and refusal of payment because of lack of funds therefor. In the case of Skinner v. Platte County, 22 Mo. 437, 1. c. 439, the court stated:

" * * * These county warrants do not bear interest until a demand is made for payment, and the treasurer's endorsement on the back of the non-payment because there are no funds.

"By the act of 1849, the county warrants are made redeemable according to their respective dates. The treasurers are to pay the oldest outstanding warrants first,

Honorable Harry J. Revercomb

and no interest is to be allowed on any warrant after the money has been received into the county treasury sufficient for its redemption; but the treasurer shall set apart and keep the money sufficient for such warrant until it is called for by the holder of such warrant. (Acts of 1849, p. 37.) * * *

In the case of Isenhour v. Barton County, 190 Mo. 163, 88 S.W. 759, the court stated at 190 Mo., l. c. 170:

"County warrants are creatures of the statute, and can only be issued in accordance therewith, but when no rate of interest is prescribed upon their face, they bear interest at the rate of six per cent per annum, as provided by section 3705, Revised Statutes 1899, after presentation to the treasurer of the county by which issued, and failure to pay because of there being no money in the treasury for their payment. * * *"

In view of the foregoing, inasmuch as the Legislature has expressly provided that drainage district warrants shall be governed by the law applicable to county warrants, interest would be payable on the warrants only from the date of presentment.

However, the warrant in the case presented by you bears upon its face the statement, "this warrant to draw interest from date at the rate of six per cent per annum." Does this provision of the warrant change the general law regarding interest?

County court drainage districts are public corporations under the sole and exclusive charge and control of the county court. (State ex rel. Applegate v. Taylor, 224 Mo. 393, l. c. 471, 123 S.W. 892.)

The county court in its management of county affairs has only such powers as are granted and limited by law, and it must pursue its authority and act within the scope of its powers. (Bradford v. Phelps County, 210 S.W. (2d) 996, 999 (5).)

The same rule would be applicable to a county court in its management of drainage districts under its control. We find no

Honorable Harry J. Revercomb

statutory provision, authorizing a county court in drawing either county or drainage district warrants, to provide that such warrants shall draw interest from date. In the absence of any statutory authority for such interest, we are of the opinion that the county court is not empowered to provide for interest from date of warrants. Therefore, we are of the opinion that the provision on the face of this warrant does not effect the general rule regarding the time from which it should draw interest, to wit, upon presentment and non-payment.

CONCLUSION

Therefore, this department is of the opinion that a warrant issued by a county court on behalf of a county court drainage district bears interest from the date of presentment and non-payment, and that the fact that the warrant bears on its face a notation that it bears interest at the rate of six per cent per annum from date is of no effect.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General 

RRW/feh

COUNTY COURT:

County Court cannot act as agent of individual in purchasing Federal property.

February 1, 1950

Honorable Matt H. Reichert
Prosecuting Attorney
Wayne County
Greenville, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an opinion of this department, and reading as follows:

"The problem of the sale and purchase of U. S. Government surplus Property and is confronting the Wayne County Court, and therefor, the Wayne County Presiding Judge, R. L. Garren, has called on me to ask for a ruling from the State Attorney General's Office on the legality of the manner in which the sale and purchase is proposed to be made.

"The Government Village, now a Surplus property, acquired in the years of 1940, consisting of land and buildings, for the purpose of housing the Government Engineers and equipment, during the construction period of the Clear Water Dam on Black River in Wayne and Reynolds Counties, the construction of which has apparently been completed.

"It also would appear that County Municipalities have a preferred right to purchase such property. However, Wayne County is not financially able to purchase the above units outright. However have been approached by an individual asking the County to act as mediator at a profit to the County of \$1000.00, which is to go to the County, as County funds, and also thereby returning the property back into the regular taxable property channel, which the County is in dire need of.

Honorable Matt H. Reichert

"The question is, would the members of the County Court, as individuals, render themselves liable to act as a mediator in a sale of the Government property as above outlined."

The law in this state with regard to the power of county courts is well stated in the case of Lancaster v. County of Atchison, 180 S.W. (2d) 706, where the Supreme Court of Missouri, en Banc, said at 1. c. 708:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' Sturgeon v. Hampton, 88 Mo. 203, loc. cit. 213. Quoted with approval in the case of Morris et al. v. Kerr et al., 342 Mo. 179, 114 S.W. 2d 962, loc. cit. 964.

"Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation.
* * *"

We cannot find no statutory authority for a county court to act as agent of a private individual in purchasing surplus property of the Federal government. Therefore, it is our view that the county court has no such authority.

Honorable Matt H. Reichert

CONCLUSION

It is the opinion of this department that the county court of Wayne County has no authority to purchase surplus Federal property for an individual.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

.....
J. E. TAYLOR
Attorney General

SCHOOLS: Maximum compensation of secretary of school board of a town or city school district organized under Article 5, R.S. Mo. 1939, is \$150.00 per year.

10-6-50

October 2, 1950

Honorable James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"Section 10501, R.S. Mo. 1939, Laws of Missouri, 1945, p. 1654, provides that the compensation of a secretary of the Public School Board of a city, town or village may receive reasonable compensation for services not to exceed \$150.00 annually. I assume the provisions of that section apply to consolidated districts formed under the preceding sections.

"I would like to have your opinion on the following questions:

"a. Does the \$150.00 limitation apply to a secretary who is not a member of the Board?

"b. May a School Board increase the compensation paid its secretary by paying the secretary a fixed amount each month for travel expense? The amount of such payment being fixed and determined in advance irrespective of miles traveled, if any.

"c. May such a School Board increase the compensation paid its secretary by paying the secretary a fixed amount each month for miscellaneous expense? The amount of such payment being fixed and determined in advance irrespective of expenses actually incurred, if any."

Honorable James T. Riley

Your opinion request inquires into the manner of compensating the secretary of a school district organized under the provisions of Article 5, R.S. Mo. 1939.

Section 10470, Laws of Missouri, 1945, page 1650, in part, provides:

"Within four days after the annual meeting, the board shall meet, the newly elected members, who shall be qualified by the taking of the oath of office prescribed by Article VII, Section 11, of the Constitution of Missouri, and the board organized by the election of a president and vice-president, and the board shall, on or before the fifteenth day of July of each year, elect a secretary and a treasurer, who shall enter upon their respective duties on the fifteenth day of July; said secretary and treasurer may be or may not be members of the board. * * *"

The above section provides for the election of a secretary and treasurer of the type of school district in question, and it is noted that the statute provides that said officers may be or may not be members of the school board.

Section 10501, Laws of Missouri, 1945, page 1654, in part, provides:

"No member of any public school board of a city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that of the treasurer shall not exceed fifty dollars for any one year; * * *"

As we interpret Section 10501, above, it provides first that no member of the school board is entitled to hold any office or employment of profit with said school board except that of secretary and treasurer.

Honorable James T. Riley

The second proviso of the statute pertains to the compensation of the secretary and treasurer, which we interpret to be applicable whether the secretary or treasurer is or is not a member of the school board. The statute is clear in providing that the compensation of the secretary shall not exceed \$150.00 for any one year.

We might further point out that the organization of consolidated school districts, as well as city and town districts, is provided for in Article 5, R.S. Mo. 1939, and the provisions of Section 10501, supra, would be applicable to consolidated school districts in view of the provisions of Section 10487, R.S. Mo. 1939, which, in part, provides:

" * * * When such new district is formed it shall be known as 'Consolidated district No. of county,' and shall organize at a special meeting within fifteen days after the formation thereof; such organization and the government of such consolidated district shall be under and in compliance with the laws governing town and city school districts as provided in article 5 of this chapter."

Consequently, in answer to the question presented in paragraph (a) of your letter, we believe that the \$150.00 limitation applies to a secretary who is not a member of the school board.

Our examination of the statutes fails to disclose any other statutory provision which would grant additional compensation to the secretary of the school board.

We further believe that the rule applicable to public officials pertaining to their compensation would also apply to the secretary as an official of the school board, and it has been held that the right of a public official to compensation must be founded on a statute and that generally they may not receive compensation in addition to that authorized by law. Nodaway County v. Kidder, 129 S.W. (2d) 857, 344 Mo. 795; Smith v. Pettis County, 136 S.W. (2d) 282, 345 Mo. 839; Rinehart v. Howell County, 153 S.W. (2d) 381, 348 Mo. 421.

Therefore, in the absence of any statutory provision that would permit compensating the secretary of the school board in the manner set out in paragraphs (b) and (c) of your letter, it is our belief that such additional compensation would not be allowed.

Honorable James T. Riley

CONCLUSION

It is therefore the opinion of this department that the secretary of a school board of a city, town or consolidated school district organized under the provisions of Article 5, R.S. Mo. 1939, is only entitled to the annual compensation of \$150.00, even though said secretary is not a member of the board. It is further the opinion of this department that the secretary of the school board is not entitled to additional compensation for traveling expenses or miscellaneous expenses on a fixed amount basis per month, regardless of miles traveled or miscellaneous expenses actually incurred.

Respectfully submitted,

RICHARD F. THOMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

CORONER: Coroner has no authority to order return of body
for holding of inquest. No crime for removing
DEAD BODIES: a body from jurisdiction of coroner.

October 10, 1950

Honorable John M. Rice
Prosecuting Attorney
Newton County
Neosho, Missouri



Dear Mr. Rice:

This is in reply to your request for an opinion which reads as follows:

"We have a situation in this county on which I would appreciate an opinion from your office. As you know the city of Joplin is located in Jasper County and adjoins the north-west border of this county. We have had numerous occasions in the past where a death occurred by violence or casualty in the northwest part of this county where funeral directors from Joplin have removed the dead bodies from the scene of the crime or accident, and from the county, before the Newton County Coroner had arrived at the scene. The most recent case was on September 7th when an automobile accident occurred in this county in which a woman was instantly killed, and in which there was some indications of criminal negligence. The coroner was immediately notified, and arrived at the scene within 25 minutes, but the body had been removed to Joplin. This makes it impossible for the coroner to conduct a proper investigation, or to hold an inquest.

"I would appreciate an opinion as to what, if any, action can be taken against persons who thus remove bodies from this jurisdiction,

Honorable John M. Rice

and what powers the coroner has to order the body returned to this county for purposes of swearing a jury and conducting an inquest."

Sections 13227 and 13231, R.S.Mo. 1939, deal with the duties and jurisdiction of coroners. These sections are as follow:

"A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

This office has had previous occasion to consider the above sections in relation to the jurisdiction of coroners. In an opinion under date of December 15, 1948 (Hugh Waggoner) this office denied the authority of a coroner to issue blanket instructions that all bodies be left at the scene until the coroner arrives.

In an opinion under date of August 25, 1941 (N. Burton Short) this office considered the question as to the coroner's duty to investigate deaths where the alleged act of violence or accident was outside the legal boundaries of his county but where death occurred within the boundaries of his county. The opinion cited the following from Volume 4, American & English Annotated Cases at pages 1161 and 1162:

Honorable John M. Rice.

"* * * Originally, in England, the office of coroner was one of great dignity and authority, and coroner's juries had the power, like grand juries, to present indictments for murder. The power and authority of the coroner from usage and statute have been much curtailed, * * *

"* * * Under the old system, where the coroner's jury performed the functions of a grand jury, this might require the removal of the body back to the jurisdiction where the crime was committed; but under the system in this state the inquest is to speedily inquire into the cause of death for the purpose of apprehending the guilty parties, and the testimony then taken to be an aid to the grand jury. * * *

"In England, under the common law, prior to the statute of 6 & 7 Victoria, chapter 12, the jurisdiction over an inquest, as regards place where the same might be held, was conferred upon the coroner only within whose jurisdiction the injury which caused the death had been received. * * *."

Thereafter, the opinion states:

"This statement is borne out by the Missouri Statutes as they apply to coroners. It seems that under the earlier authorities where the coroner's jury was acting in the capacity of a grand jury that the body had to be moved back to the jurisdiction where the crime was committed, but it seems under the later statutes which authorized the inquest to be held in the county in which the body is found, the result is that the inquest is more speedily made and in some cases with less expense. It seems that the rule of construction of the statutes similar to the Missouri Statutes was announced in

Honorable John M. Rice

Volume 4, American & English Annotated Cases, page 1163, as follows:

"But the common-law rule was suspended by the statute of 6 and 7 Victoria, Chapter 12, which provided "that the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead, shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner."

"In a case construing this statute, where the injury was inflicted and death occurred outside the city of London, but afterward the body was removed into the city, it was held that the inquisition was properly held by the coroner of London, although the cause of death arose without his jurisdiction. Reg. v. Ellis, 2 C. & K. 470, 61 E.C.L. 470. But it was held that the coroner of a county wherein a dead body was found could take an inquisition only in that county. * * *

"In the United States statutory provisions in most of the states determine the proper place for the holding of inquests, and decisions construing these statutes are not numerous.

"Where a person died in one county and was buried in another county, and after burial it became necessary to exhume the body in order to hold an inquest to determine the manner and cause of death, it was held that if there were conflicting claims between the coroner of the county wherein the person died and the coroner of the county wherein the body was buried, the former would have the better right; but in the absence of such conflicting claims, the coroner of the county wherein the body was buried had jurisdiction to hold a valid inquest. In its opinion the court said:

Honorable John M. Rice.

"An inquest must always be super visum corporis, and could not have been held in the other county without taking the body back there, thus involving useless expense and delays, and in some cases that may easily be imagined, such removal from the place of interment back to the place where the death occurred would be impracticable, and if the position taken by counsel for defendant is correct, defeating the ends of justice, or at least hindering them greatly by preventing the holding of any inquest at all. * * * On the whole, it would seem to be in accord with reason and convenience to say that under such circumstances as appear in the case now under consideration, the inquest could be lawfully held, as it was, in Erie county (the county wherein the body was buried)." Pickett v. Erie County, 19 S.N.C. (Pa.) 60, 3 Pa. Co. Ct. 23. See also Jameson v. Bartholomew County, 64 Ind. 524, 86 Ind. 154. But see Rentschler v. County, 1 Leg. Rec. (Pa.) 289, where the contrary was held.

"Under a statute providing that the coroner shall take inquisition over dead bodies "found within the county," it has been held that a body is found within the county within the meaning of the statute whenever it is ascertained by any means that it is within the county. State v. Bellows, 62 Ohio St. 307."

The conclusion reached by the writer of this opinion was:

"We are, therefore, of the opinion that in cases of assault committed on a person outside of your county and the person is later brought to your county and there dies, that under Section 13227, supra, it is your duty to hold an inquest over this body, and that under said Sections 13251 and 13252,

Honorable John M. Rice

your county court would be the body to which your fee bill should be presented for allowance and payment."

In view of this former opinion, and considering the authorities cited therein, we believe that jurisdiction attaches to the coroner of Jasper County when the dead body is taken within the confines of his county and he is notified of the presence of the dead body. Therefore, it would seem that the coroner of Newton County would have no jurisdiction of the case when the body is no longer to be found in Newton County. Since he does not have any jurisdiction at that time there would be no way for him to order the body returned for an inquest.

In answer to your other question we are unable to find any statute making provision for any action against persons who remove bodies from the jurisdiction of one coroner to another. Admittedly, the Missouri statutes concerned with the office of coroner are incomplete and difficult of application. However, we must accept the law as written and must apply the statutes which are in effect at the present time.

CONCLUSION

Therefore, it is the opinion of this department that no action can be taken against persons removing bodies from the jurisdiction of one coroner to another and the coroner in the county where the accident or felony has been committed has no authority to order the body returned for the purpose of holding an inquest.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

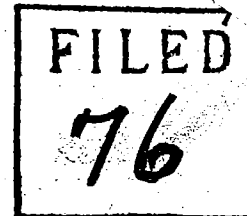
APPROVED:

J. E. TAYLOR
Attorney General

HEALTH CENTER: Public health center tax approved on January
: 11, 1950, should be collected for the year
TAXATION : 1950, based on assessment as of January 1, 1950.

March 22, 1950

Honorable Horace T. Robinson
Prosecuting Attorney
Pulaski County
Waynesville, Missouri



Dear Mr. Robinson:

This is in reply to your request for an
opinion which is as follows:

"An election was held in this County
on the 11th day of January, 1950, at
which the question relating to main-
tenance of a health center in this
County, under Secs. 9854.102 et seq.,
R.S. Mo. 1939, was submitted and ap-
proved.

"I would appreciate your opinion as
to whether the taxing officers of the
County can assess the health center
tax for the year 1950, and whether
that assessment should be as of January
1, 1950, or as of the date of the elec-
tion. Your consideration and opinion
will be appreciated."

In Laws of Missouri, 1945, page 969, the County
Courts are given authority to submit to the qualified
voters of the counties the question as to whether or
not there shall be a bond issue for a public health
center. The petition must contain a statement as to
the "amount of the tax to be levied upon the assessed
property of said county or counties, * * * ."

In Laws of Missouri, 1945, page 970, there is
a provision for a form of ballot and following immediately
thereafter is found the following language:

"If a two-thirds majority of the votes
cast at such election on the proposi-
tion so submitted, shall be in favor
of a mill tax for such bond

Honorable Horace T. Robinson

issue, the county court shall levy the tax so authorized, which shall be collected in the same manner as other taxes are collected and credited to the 'Health Center Fund' and shall only be paid out on the order of the official health organization."

(Underscoring ours.)

You will note that the underlined portion of the statute provides that the tax shall be collected in the same manner as other taxes are collected. A skeleton view of the procedure for the methods of assessment, levying and collection of taxes may be found in a review of the following statutes:

Laws of Missouri, 1945, page 1800:

"Section 4. Property liable for taxes--Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Laws of Missouri, 1945, page 1774:

"Section 10970. Assessment of real estate to commence on January 1, 1946, and every year thereafter.--Real estate shall be assessed at the assessment which shall commence on the first day of January, 1946, and shall be required to be assessed every year thereafter."

Laws of Missouri, 1945, page 1785:

"Section 10. * * * * *
After receiving the necessary forms the assessor or his deputy or deputies

Honorable Horace T. Robinson

shall, except in the City of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, * * *."

Laws of Missouri, 1945, page 1779:

"Section 11040. Taxes to be assessed, levied, and collected. The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and taxes necessary to pay the funded or bonded debt of the state, county, township, municipality, road district, or school district, the taxes for current expenditures for counties, townships, municipalities road district and school districts, including taxes which may be levied for library, hospitals, public health, recreation grounds and museum purposes, as authorized by law."

Laws of Missouri, 1945, page 1780:

"Section 11044. Rate of taxation to be fixed on objects of taxation.--After the assessor's book of each county, except in the City of St. Louis, shall be corrected and adjusted according to law, but not later than September 1, of each year, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Honorable Horace T. Robinson

Laws of Missouri, 1945, page 1958:

"Section 11048. Shall extend tax book.-- The assessor's book shall be corrected and adjusted not later than September 1 of each year. The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for such extensions, according to the rates levied; and shall on or before the 31st day of October of each year deliver the tax book with the rates extended therein to the collector. The assessor's book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax book for the use of the Collector; and when the assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the clerk with the seal of the court. And upon a failure to make out such extension of taxes in the assessor's book or books, as the case may be, and deliver same to the collector not later than October 31, the county court shall deduct twenty per centum from the amount of fees which may be due the clerk for making such extension, and such assessor's book, with the taxes so extended therein, shall be called the 'Tax Book.'"

Section 11079, R.S. Mo. 1939:

"It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; * * * ."

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From the above it is seen that the assessment is made beginning on January 1, 1950, even though the determination of the tax rate and the levy of the tax is not made until a much later date. The rate, of course, is dependent upon the assessed valuation of the property located in the county. The law providing for the establishment of public health centers, and making provision for the issuance of bonds and taxes to retire said bonds, was in full force and effect as of January 1, 1950. When the voters voiced their approval of the establishment of a health center it then became the duty of the county court to levy the taxes so authorized, and collect them in the same manner as other taxes are collected. There is no provision made for deferring the collection of such taxes and, since there is a positive provision that the taxes shall be collected in the same manner as other taxes are collected, we believe it clear that the taxes should be collected for the year 1950. In this view we are fortified by certain judicial decisions from other jurisdictions. In the case of *People vs. Goldfogle*, 205 N.Y.S. 870, the Court was considering a similar question as to whether or not a statute passed in 1923, authorizing the collection of the tax should be applied to the year 1923. In disposing of the contrary contention the Court said at l.c. 876;

"Relators claim that the statute does not apply to the year 1923. It provided a penalty for failure to file a statement by June 1st. It became a law on June 1st. The requirement that reports be filed on June 1st was for the assistance of the tax commissioners. It was not essential to the preservation of due process of law. The delay in enactment of the law might constitute a defense to an action for the penalty. It cannot postpone operation of the whole act in the face of the enacting clause which provided that it should take effect immediately. The statute is part of the general Tax Law. It provided that assessment rolls were to be made up as of August 1st. The third Tuesday of August was made the grievance day.

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Abundant opportunity was thus afforded to the relators to assert their rights after the statute became effective. That the taxable status was fixed as of a time antedating the date on which the law became effective does not indicate intent to postpone the operation of the law. As Mr. Justice Field said in *Locke v. New Orleans*, 4 Wall. 172, 173 (18 L. Ed. 334):

"In the first place, the act was not subject to the imputation of being retrospective. It did not operate upon the past, or deprive the party of any vested rights. It simply authorized the imposition of a tax according to a previous assessment."

In the case of *Norfolk & W.R. Co. vs. Supervisors of Smyth County*, 12 S.E. 1009, the Supreme Court of Appeals of Virginia considered the application of a taxing statute in the same year that it was passed. At l.c. 1012 the Court said:

"But it is contended that the right to levy this tax was not acquired until the year 1881. There is no solid ground upon which this contention can rest. The act of March 13, 1877, prescribing the manner of assessing railroad property for state purposes, was in no way affected by the subsequent act of February 27, 1880, conferring authority upon the board of supervisors of a county to levy a tax for county and school purposes upon the real estate of any railroad company within such county. We are bound to presume, in the absence of anything to the contrary, that the board of public works regularly made the annual assessments of all railroad property required of it by said act of March 13, 1877, including that for the year 1880. This being so, on the passage of the act of February 27, 1880, it became the duty of the board of supervisors to make the levy in question, and not to have done so would have been a serious dereliction of duty, prejudicial to the rights

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of other tax-payers, who were entitled to a pro rata assessment and levy upon the real estate of the railroad company. The contention that the right to make the levy did not accrue until 1881 is opposed to both the letter and spirit of the constitutional and statutory provisions above referred to. The board of supervisors had the right to make the levy, even though the county levy had previously been made and completed as to other subjects of taxation. See Railroad Co. v. Koonz, 77 Va. 698; Shenandoah Val. R. Co. v. Supervisors of Clark Co., 78 Va. 269; and the very late case of County of Prince George v. Railroad Co., ante, 667. These cases, in every essential particular, rule the case in hand."

In the Case of Samuel Locke vs. The City of New Orleans, 71 U.S. 172, 18 L. Ed. 334, the Supreme Court of the United States considered a similar question of law as the one now before us, and concluded at l.c. 335:

"The legislature of Louisiana in 1850 passed an act authorizing each of the municipalities of the city of New Orleans to levy a tax on capital within its limits on the assessment rolls of 1848 and 1849, not to exceed the amounts imposed by existing ordinances. The present action was instituted to recover, in part, the amount of the tax levied under this act upon capital owned and employed by the defendant in one of the municipalities. As a defense the defendant, among other things, alleged the unconstitutionality of the act of the legislature authorizing the tax. The district court, in which the action was brought, gave judgment for the city, and the supreme court of the state affirmed the judgment.

"The unconstitutionality of the act was asserted from its supposed retroactive operation, upon the notion that the prohibition of the Federal Constitution upon the states, to pass an ex post facto law, extended to all retrospective laws.

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"There was nothing in the position taken which entitled it to consideration. In the first place, the act was not subject to the imputation of being retrospective. It did not operate upon the past, or deprive the party of any vested rights. It simply authorized the imposition of a tax according to a previous assessment. * * *."

You ask further whether the assessment should be as of January 1, 1950 or as of the date of the election. We call your attention to Section 10970 which is set out at page 2 of this opinion which provides that real estate assessments shall commence on the 1st day of January. Since this is the assessment provided by law for taxes in the year 1950, therefore, it must be used in determining the tax due for this year.

CONCLUSION

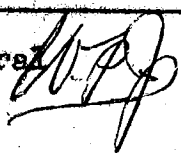
Therefore, it is the opinion of this department that the health center tax approved by the people on the 11th day of January, 1950, should be levied and collected in the same manner as other taxes are collected in the year 1950, and the assessment should be as of the 1st day of January, 1950.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



JRB:lr:an

GUARDIAN:
WARDS:

Guardian not authorized to invest minor ward's
funds in life insurance.

April 19, 1950. 4/21/50



Mr. Carl F. Sapp,
Attorney at Law,
Columbia, Missouri.

Dear Mr. Sapp:

We have your recent request for an opinion from this
office. Your letter of request is in part as follows:

"Judge William J. Ridgeway, Probate Judge
of Boone County, has received a petition
from the public administrator, asking
that the administrator be allowed to pur-
chase a policy of ordinary life insur-
ance on the life of a ward for whom he is
guardian and curator. The life insurance
is to be payable to the estate of said
ward.

"Will you please give me an opinion as to
whether the investment of the funds of a
minor, by his guardian and curator, in or-
dinary life insurance is a legally accept-
able investment?"

The Supreme Court of this state in the case of *In re
Farmers' Exchange Bank of Gallatin, Mo.* 37 S.W. (2d) 936 ruled
as follows, 1.c. 941:

"In approaching this question, we must
keep in mind that the plaintiff in this
action is not dealing with her own property,
but she stands before the court in a repre-
sentative capacity of guardian and curator
for minor children. In this capacity plain-
tiff has certain duties to perform, by vir-
tue of the mandate of the Missouri statute.
Failing in these duties, a guardian is sub-
ject to removal by the probate court. Sec-
tion 418, Rev. St. Mo. 1929 (also 1939) pro-
vides in part, as follows: 'Guardians and
curators shall, unless the money be invested

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April 19, 1950.

in improving the real estate of the wards as hereinafter provided, loan the money of their wards at the highest legal rate of interest that can be obtained, on prime real estate security, or invest it in bonds of the United States, or of the state of Missouri, or of the federal farm loan bank except where the estate is less than three hundred dollars, in which case good personal security may be taken, and shall account for all such interest received, which shall be charged in their annual settlement. * * *

"It was therefore the duty of plaintiff to invest the funds in question in the manner provided by the section of the statute quoted.

* * * * *

"Section 418, above quoted, speaks in no uncertain terms with reference to the manner in which the funds in the hands of a guardian and curator must be invested. If funds are otherwise invested, except as provided by statute, it is unlawful. Even the probate court cannot legally authorize the investment of such funds, except as prescribed. * * *

(Words in parenthesis ours)

Similarly, in Round Prairie Bank of Fillmore v. Downey 64 S.W. (2d) 701, the Kansas City Court of Appeals stated as follows, l.c. 704:

"Indeed, there is no authority found in the statute for the investment of a ward's money in a bank certificate of deposit, running for a period of twelve months, as in this case, unless upon the theory that it is a loan; and, if a loan, the proper security should have been exacted. In whatever light viewed, it is not the ordinary and usual deposit; but, in the light of the statute quoted, it is an unauthorized and unlawful investment of the money of the ward and amounts to a misappropriation of the same. By the statute, the guardian and curator is directed to lend the money or invest it in a certain type of bonds, if not

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used in the improvement of the ward's real estate. If the ward's funds are otherwise invested than as provided by statute, it is unlawful. * * *

More specifically, in 39 C. J. S. 139, 141, we find the following:

"While a guardian is generally authorized to make any investment which, in his best judgment, arrived at in good faith and after the exercise of due diligence, will secure the principal and yield a reasonable income therefrom, if the character of investments which are permissible is prescribed by statute or constitutional provision, he may lawfully invest only in such securities as the law prescribes. (Citing Mo. cases)

* * * * *

"As a general rule, the guardian should not invest the ward's property in trade or speculation, or in obligations in which the guardian has an individual interest. Where the statute does not authorize such an investment, the guardian may not purchase stocks and bonds of private corporations or policies of insurance on the life of the ward, * * *

(Underscoring ours)

The above citations make it clear beyond question that ordinary life insurance would be improper and unlawful as an investment of the funds of a minor ward.

There exists, however, a possible justification for the purchase of ordinary life insurance on the life of a minor ward. That possibility arises under the provisions of Section 402 R.S. Mo. 1939 as follows:

"The probate court shall order the proper education, support and maintenance of minors, according to their means, and for such purposes may, from time to time, make the necessary appropriations of the money or the personal estate or income of such minor not otherwise provided to be used; and when

April 19, 1950.

the money, income or personal estate of such minor shall be insufficient or not applicable to such objects, purpose or purposes, the court may order the lease or sale of the real estate of such minor, or so much thereof as may be requisite, or that said real estate be mortgaged, to raise the funds necessary to maintain, support and educate such minor or to raise the funds necessary to pay off any pre-existing debts, for which the estate of such minor is legally liable."

We are unable to find any Missouri cases wherein the courts have applied said Section 402 to test the purchase of insurance as "maintenance and support," but the following case from New York, which has substantially similar statutes, seems directly in point. In *re Vanderbilt's Estate*, 223 N.Y.S. 314, the court held as follows, 1.c. 316:

"The application is denied as a matter of law, and not of discretion. I hold that the statutes of this state do not permit the investment of infant's funds in policies of life insurance. In substance and in effect, the issuance of these policies and the payment of the premiums would amount to an investment of the infant's funds. Under our statutes a guardian may invest the funds of an infant's estate only in first mortgages on real estate, with certain limitations, and in bonds which are legal investments for savings banks. Domestic Relations Law, Sec. 85; Decedent Estate Law, Sec. 111, as amended by Laws 1926, c. 307; Banking Laws, Sec. 239. There is no statutory authority for the guardian to invest, or the surrogate to countenance the investment of the funds of the ward in policies of life insurance.

"I hold further that section 194 of the Surrogate's Court Act (Laws 1920, c. 928) does not permit under the guise of an application for the support of a ward, an allowance for the payment of insurance premiums. The word 'support' comprehends 'anything requisite to the housing, feeding, clothing, health, proper recreation, vacation, traveling expense,' or

Mr. Sapp:

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other proper cognate purposes included within the scope of the word. Jessup-Redfield, Surr. (6th Ed.) 1494."

The Vanderbilt case, supra, was commented upon and approved in the more recent case of Rooney v. Wiener 263 N.Y.S. 222.

Although the Vanderbilt case is not controlling here, we find it persuasive, because the views therein expressed are, in our opinion, entirely consistent with what we understand to be the plain and common meaning of "maintenance and support." Certainly it would be a gross sophistry to deny guardians the authority to invest their wards' funds in ordinary life insurance, only to permit them to evade that rule by allowing them to apply the income, from the authorized investments, to the purchase of life insurance under the guise of "maintenance and support."

CONCLUSION

It is, therefore, the opinion of this office that a guardian or curator can not invest the funds of a minor ward in ordinary life insurance; nor can he apply the income from authorized investments to the purchase of said insurance.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
Attorney General

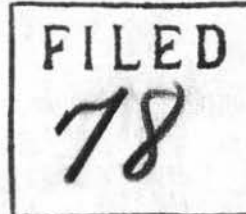
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CENSUS:
CIRCUIT COURT
REPORTERS:

For the purpose of determining the salary of a circuit court reporter, the 1950 decennial census of the United States becomes official on the date the announcement of the population of the area comprising a judicial circuit is made by the District Supervisor of the census within the area which comprises the judicial circuit.

November 2, 1950.

Honorable Carl F. Sapp,
Prosecuting Attorney
Boone County,
Columbia, Missouri.



Dear Sir:

This will acknowledge receipt of your recent request for an official opinion from this office. You thus state your request:

"The question has arisen as to whether the Circuit Court Reporter of this county is entitled to a salary increase. Section 13341 of the Revised Statutes of Missouri, as amended in 1946, provides that the salary for Circuit Court Reporters shall be \$3,500.00 per year in circuits of over 60,000 population. The 1950 census figures, as announced in May, 1950, show that the population of Boone County is 48,171, and Callaway County, 23,171, or a total of 71,342 for the 34th judicial circuit.

* * * *

"Section 1.10 of Senate Bill 1001 provides that salary increases for county officers, deputies and assistants shall begin January 1, 1951. However, it is the contention of the court reporter, and I am of the same opinion, that this section does not include the court reporter for his is not an officer, nor is he a deputy, nor is he an assistant.

"In the case of State ex rel. Scobee v. Meriwether, 355 Mo. 1217, 200 S.W. 2d. 345, the Court held that the court reporter is not a public officer but an employee, and, therefore, was entitled to an immediate increase in salary under House Bill No. 293 of the 63rd General Assembly on the effective date of that law.

"Your office is earnestly requested to give me an opinion on this matter for the purpose of getting the court reporter his raise in salary from \$3,100.00 to \$3,500.00, effective as of June 1, 1950."

Prior to the enactment of Senate Revision Bill No. 1001, of the 65th General Assembly, there was no statutory provision, either federal or state, which designated the time when the result of a federal decennial census became official. The 65th General Assembly declared the population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year shall be determined on the basis of the last previous decennial census of the United States, and fixed the effective date of the 1950 decennial census of the United States on January 1, 1951, and the effective date of each succeeding decennial census of the United States on January 1, of each tenth year after 1951. Senate Revision Bill No. 1001, of the 65th General Assembly, Section 1.10 reads as follows:

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1, of each tenth year after 1951."

Inasmuch as this section applies only to political subdivisions and a judicial circuit is not a political subdivision this section can have no application to fixing the effective date of the 1950 decennial census for the purpose of determining the population in a judicial circuit for ascertaining the salary of a circuit court reporter.

Laws of Missouri, 1945, page 741 (Mo. R.S.A. Sec. 13341) provides in part:

"Court Reporter shall receive salary as follows: in judicial circuits which now have and such as may hereafter have a population of sixty thousand or more, an annual salary of three thousand five hundred dollars * * *."

We find the salaries of circuit court reporters are based on the population of the circuit in which they are employed. The federal decennial census is the basis for determining the population of the area composing each circuit. Also, we find from reviewing the case of State ex rel. Scobee v. Meriwether, 355 Mo. 1212, 200 S.W. (2d) 340, the court declared a court reporter is not a public officer. The court said: "When the various elements of a public office and the characteristics of a public officer are considered in connection with our statutes dealing with an official court reporter, he is not a public officer but an employee, and therefore relatrix is entitled to the increase in salary under House Bill No. 293 of the 63rd General Assembly on the effective date of that law."

Since the salary of the circuit court reporter is determined by the population of the judicial circuit and the population is determined by the last census of the United States your question must be answered by determining when the census of 1950 becomes "official" or effective in relation to your question. We recognize Senate Revision Bill No. 1001, quoted supra, does not apply to fixing the effective date of the 1950 decennial census in a judicial circuit and we find no other statute fixing the effective date of the 1950 federal census for the purpose of fixing salaries of circuit court reporters.

In the case of Dunne vs. Kansas City Cable Railway Co., 131 Mo. 1, the court said, in part:

"The census is taken by the United States regularly every ten years. All the means are provided for having an enumeration of all counties, cities, and other subdivisions of the state taken accurately. More reliable evidence of the population of counties and cities could not be provided under existing laws than that afforded by the United States census.

* * * *

"We can see no objection to a classification based upon census returns. Indeed the United States census is made the basis for state legislation, since the repeal of the law providing for taking a state census. Section 967 declares: 'All representation or other matters heretofore or now based on the state census shall be based on the United States census of this state.' No reason can be seen why classification of counties and cities for legitimate legislation might not properly be based upon the same evidence. The courts take

judicial notice of the facts appearing from the census returns. State ex rel. v. Herrmann, supra."

We would now call your attention to the case of Varble vs. Whitecotton, 190 S.W. 2d. 244, in which case the court said in part:

"There is no statutory provision, either Federal or State, which sets the time when the result of a census shall become official. In such a situation the general rule is that a census becomes official as of the date of its official publication. 14 C.J.S. Census, Section 6. This court has always taken judicial notice of 'the official records of the census' and we find no case where the fact of population has been proved by other means. State ex rel. Harris v. Herrmann, 75 Mo. 340; State ex rel. Martin v. Wofford, 131 Mo. 61, 25 S.W. 851; State ex inf. Crow v. Evans, 166 Mo. 347, 66 S.W. 355. In State ex rel. Major v. Ryan, 232 Mo. 77, 133 S.W. 8, a quo warranto to remove the jury commissioners of St. Joseph because the population fell below the applicable limit, the national census of 1910 'as officially promulgated' was the basis of the decision. And in Jerabek v. City of St. Joseph, 159 Mo. App. 505, 141 S.W. 456, which considered a motion to quash a panel selected by the above jury commissioners, the court of appeals in sustaining the motion pointed out the jury had been selected after 'the federal census of 1910 was officially announced.' To the same effect see Childers v. Duvall, 69 Ark. 336, 63 S.W. 802; Holcomb v. Spikes Tex. Civ. App. 232 S.W. 891; Lewis v. Lackawanna County, 17 Pa. Super, 25; Id., 200 Pa. 590, 50 A. 162. There are contrary rulings mainly in cases where the fact of population rather than its determination by the census controls. See Underwood v. Hickman, 162 Tenn. 689, 39 S.W. 2d. 1034; State ex rel. Jordan v. Dehart, 15 Wash. 2d 551, 131 P. 2d. 156; City of Twin Falls ex rel. Cannon v. Koehler, 63 Idaho 562, 123 P. 2d 715; Forde v. Owens, 160 S.C. 168, 158 S.E. 147.

"The Application of the statute we are considering is governed by the official records of the census. The statute itself denotes this. According to its terms the mere fact of the population in and of itself does not determine the statute's relevancy. The determining factor is enumerated according to the last preceding

national census.' Thus the operation of the statute is based on the record of the census. The record of the census furnishes evidence under which the statute shall be operative. *Dunne v. Kansas City Cable R. Co.*, 131 Mo. 1, 32 S.W. 641. This appears to us to be an added reason why the application of the statute to Jackson County could not change at least until the official record of the 'last preceding census' was promulgated disclosing Jackson County had a population which was without the limits set by the statute.. Even thereafter a de facto jury might properly function under certain circumstances but we need not determine such a question in this case."

We would next direct your attention to the case of *Garrett v. Anderson*, 114 S.W. 2d 971, a Texas case, in which an opinion was rendered November 27, 1940, in which the court stated:

"This action was brought by W. R. Garrett and others, all of them being official court reporters of the District Courts and County Courts at Law of Bexar County, against Honorable Charles W. Anderson, County Judge, and the County Commissioners and County Auditor of said County. The object of the suit is to force the County officials, by mandamus or injunction, to continue, as theretofore, to pay the plaintiffs annual salaries of \$3,600 each, as prescribed by statute for court reporters in counties having a population of more than 290,000 and less than 325,000, 'according to the last preceding or any future federal census.'

"The suit was provoked by an order of the Commissioners' Court which had the effect of reducing the appellants' annual salaries from \$3,600 to \$3,000 per year, on the assumption that the population of the County was 337,557 according to the 'last preceding' (1940) federal census, whereby the County was taken out of the 290,000 - 325,000 population bracket, as ascertained by the census of 1930.

"Garrett and his associates have appealed from an order of the District Court denying mandamus and injunction.

"The appeal turns on the question of whether the population of Bexar County, as ascertained by the sixteenth decennial federal census, taken in 1940, had been officially determined and promulgated so as to give it the status of the 'last preceding

federal census' within the contemplation of the statutes prescribing the salaries of official court reporters in the several classes of counties in this state.

"Appellants stand, in their suit, upon the provision of Article 2326e, Vernon's Civ. Stats., as follows: 'Sec. 2. That the official shorthand reporter of each District Court, Criminal District Court, and County Court-at-law in each county in the State of Texas having a population of more than two hundred and ninety thousand (290,000) and less than three hundred and twenty-five thousand (325,000) inhabitants, according to the last preceding or any future Federal Census, shall receive a salary of Thirty six hundred dollars (\$3600) per annum' * * *.' As amended Acts 1939, 46th Leg. Spec. L. p. 623, Sec.1.

"The federal statutes provide no formula or procedure for the promulgation of reports of the population ascertained by the taking of any census. The nearest approach to such procedure is found in 13 U.S.C.A. Secs. 4 and 213, in which it is provided that, 'The Director of the Census is authorized and directed to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law; * *.' (Section 4.) 'The Director of the Census is hereby authorized * * * to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, * * * and to publish and distribute said bulletins and reports.' (Section 213.)

"The record in this case does not embrace any report or statement purporting to emanate directly from the 'Director of the Census,' but the Hon. Ben S. Morris, duly accredited supervisor of the census for the Twentieth District, consisting of Bexar County, issued and delivered to the County Judge the following preliminary report of the census for said County.

"From P 114 (1940 and 1930)

"Department of Commerce

"Bureau of the Census

"Sixteenth Census of the United States

11-2-50

"Office of Supervisor of Census

"821 Frost Bank Building

"San Antonio, Texas,

"June 25, 1940

"Release for Immediate Use

"Sixteenth Census-Preliminary Announcement of
Population

(Subject to Correction)

"The population of County of Bexar, State of
Texas, as shown by a preliminary count of the
returns of the Sixteenth Census, taken as of
April 1, 1940, is 337,557, as compared with
292,533 on April 1, 1930. The 1940 figures are
preliminary and subject to correction.

"Ben S. Morris

"Supervisor of Census."

"No question is made of Supervisor Morris' authority to execute and promulgate the 'preliminary announcement of population' of Bexar County, nor is there any contention that the figures in his report to the County Judge are substantially inaccurate, or so far from the true number as to affect the question presented here. The report purports (without question of its authenticity) to be upon forms furnished the Supervisor by the Census Bureau, apparently under authority provided in Sections 4 and 213 of the Census Act, supra. Like reports, or 'preliminary announcements,' of the census of the City of San Antonio and of Bexar County, were furnished on this form by Supervisor Morris to the Mayor and Chamber of Commerce, as well as the County Judge, in accordance with the policy of the Bureau. It should be presumed from the record here that Mr. Morris was acting fully within his official authority as supervisor in issuing the report for the benefit of the public.

"We are of the opinion, therefore, and here hold as a matter of law, under the record made here, that the report of Supervisor Morris amounted to an official announcement, in behalf of the federal government, that the population of Bexar County, according to the last preceding federal census, is 337,557, subject to such necessarily slight and here immaterial corrections as may be made in the final figures promulgated by the appropriate authority in the National

11-2-50

government. It follows from this conclusion that the County Officials of Bexar County were authorized to take official notice of that report as a declaration of the 'last preceding * * Federal Census' as contemplated in Article 2326e, and, accordingly, to discontinue payment of the salaries prescribed in that statute for court reporters in counties having a population of not less than 290,000 and not more than 325,000.

"The trial court therefore did not err in refusing to issue any writs requiring the county officials to authorize and make payment of such salaries. 14 C.J.S., Census, page 103, Sec. 6; Forde v. Owens, 160 S.C. 168, 158 S.E. 147; Elliott v. State, 150 Okl. 275, 1 P. 2nd 379; Herndon v. State, 119 Tex. Cr. R. 204, 44 S.W. 2d 380; Holcomb v. Spikes, Tex. Civ. App. 232 S.W. 891."

On February 18, 1950, this office wrote to the Acting Director of the Bureau of Census of the United States inquiring when census figures became official. The answer to our letter is in part quoted below:

"Soon after the completion of the actual field canvass the district supervisors will make local Announcements of preliminary population figures for counties and for urban places of 10,000 inhabitants or more in their districts. These figures result from preliminary counts made in the field and are subject to revision when the final tabulations are completed in this office. The final 1950 population of counties and cities in Missouri, including those under 10,000 inhabitants, should be available early in 1951.

"The Census law does not state when the population figures for a given area become official. This is a matter for the State authorities to determine on the basis of your State law. I am not aware of any case in which the court has refused to sanction official action based on the preliminary figures. For your information, I am referring you to the following cases which may assist you in your determination; Childers v. Duval, 69 Ark. 336, 63 S.W. 802; Holcomb v. Spikes, 232 S.W. 891; Elliott v. State of Oklahoma, 150 Okla. 257, 1 Pac. 2(d) 390; Ervin v. State of Texas, 44 S.W. 2(d) 380."

We have carefully examined the cases referred to in the letter above, and find that they do sustain the principle enunciated by the Director of the Census. The Childers case holds that announcement of population figures by a district supervisor of the census justifies official action which the law requires to be based upon the last official census of the United States.

The Holcomb case holds that the census takes effect to determine the population of a county when the portion of the census relating to the county is completed and is ready to be officially promulgated.

The Elliott case (the correct citation of which is 1 Pac. 2d 370) holds that the preliminary census announcement of the population of the City of Tulsa, Oklahoma, by the district director of the census, is official.

The Ervin case holds that a preliminary announcement of population figures, subject to correction, by the district supervisor, is official.


CONCLUSION.

From the foregoing authorities and in the absence of a statute fixing the effective date of the 1950 decennial census in judicial circuits, it is the opinion of this office that when announcement of the population of the area composing a judicial circuit is made by the district supervisor of the census of that area, this constitutes an official announcement of the result of the last census of the United States and such result determines the population of the area within the judicial circuit within the meaning of the statutes fixing the salary of the circuit court reporter. The salary should be fixed by the 1950 decennial census as of the date the announcement of the population of the area composing a judicial circuit is made by the district supervisor of the census of that area.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney-General.

APPROVED:


J. E. TAYLOR
Attorney-General.

JEM/ld

LIQUOR: Qualified voters as used in the Liquor
ELECTIONS: Control Act means registered voters in
MUNICIPALITIES: cities where registration is required.

December 19, 1950

Honorable Carl F. Sapp
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Mr. Sapp:

This is in reply to your request for an opinion which is as follows:

"I have been reading the opinion you sent to me, which was prepared on the 4th day of October, concerning the sale of liquor by the drink in municipalities of over 20,000 inhabitants. The opinion that municipalities of over 20,000 may have an election over having liquor by the drink, and may vote it out upon a proper vote.

"The question is arising, and it is a question in my mind, as to what is a proper vote. Section 4935, R.S. Missouri, 1939, provides that the petitions must be signed by 1/5 of the qualified voters. Section 4890, R.S. Missouri, 1939 provides that in municipalities under 20,000 inhabitants, a vote of the majority of the qualified voters is required. Does the phrase qualified voters, as used in the liquor statutes, mean registered voters? Does it mean those persons who are under no legal disability and who are old enough to vote whether they are registered or unregistered? Or does it mean a majority of the persons voting? I will appreciate an opinion on this question from your office. The liquor by the drink people and the no liquor by the drink people are finding this to be a debatable question."

Honorable Carl F. Sapp

Section 4935, R.S. Mo. 1939, is as follows:

"Upon application by petition signed by one-fifth ($1/5$) of the qualified voters of any incorporated city, who are qualified to vote for members of the legislature in such incorporated city of this state, the board of aldermen, city council or other proper officials of such incorporated city shall order an election to be held in such incorporated city, at the usual voting precincts for holding any general election for state officers, to take place within forty (40) days after the receipt of such petition, to determine whether or not intoxicating liquor, as defined in this act, other than malt liquor containing not to exceed five (5%) per cent of alcohol by weight, shall be sold, furnished or given away within the corporate limits of such incorporated city; such election shall be conducted, the returns thereof made and the results thereof ascertained and determined in accordance in all respects with the laws of this state governing general elections for city officers, and the result thereof shall be entered upon the records of such board of aldermen, city council or other proper officials, and the expense of such election shall be paid out of the city treasury, as in the case of an election for city officers: Provided, that at an election held under the provisions of this section, no one shall be entitled to vote who is not a resident of such incorporated city, or who is not a qualified voter of such incorporated city: Provided, that no such election held under the provisions of this section shall take place on any general election day, or within sixty (60) days of any general election held under the Constitution and laws of this state, so that such elections as are held under this section shall be special elections and

Honorable Carl F. Sapp

and shall be separate and distinct from any other election whatever: Provided further, that the board of aldermen, city council or other proper officials shall determine the sufficiency of the petition presented by the poll books of the last previous city election."

The important question which you desire to have answered is whether or not "qualified voters" means those registered or not.

By law the voters in the City of Columbia are required to register. In the early case of State ex rel. Woodson vs. Brassfield, 67 Mo. 331, the Supreme Court of Missouri had occasion to ascertain the meaning of the term "qualified voters" when there was provision for registration. In that case the Court at l.c. 336 stated:

"While the registration law was in force, they only were qualified voters whose names were placed on the registration books. This was the final, qualifying act, and no matter if a citizen possessed every other qualification, if not registered, he was not a qualified voter. It was not the right to register which constituted one a qualified voter, but the fact of being registered as such, was also essential. A qualified voter is one who by law, at an election, is entitled to vote. If, by the law, a person was not entitled to vote, whether in consequence of a disability which deprived him of the right to register, or of his neglect to register with a perfect right to do so, he was equally disqualified. * * * ."

Therefore, as we view Section 4935, supra, we deem it to mean that the petition must be signed by one-fifth (1/5) of the qualified voters who are registered.

CONCLUSION.

Therefore, it is the opinion of this department that the phrase "qualified voters" as contained in Section 4935,


Honorable Carl F. Sapp

R.S. Mo. 1939 (Liquor Control Act) means qualified voters who are registered where registration is required.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JRB:ir

FINANCE: Provisions of Section 7973, R. S. Mo. 1939, to be
CORPORATIONS: complied with by banking corporations before
Commissioner of Finance issues certificate of
compliance thereunder.

February 1, 1950

Honorable H. G. Shaffner
Commissioner
Division of Finance
Department of Business & Administration
Jefferson City, Missouri



Dear Sir:

The following opinion is rendered in reply to your recent request reading as follows:

"It comes to my attention that a state chartered bank has increased their common capital by the declaration of a common stock dividend.

"None of the provisions as provided in Section 7973, Banking Laws, Missouri, 1939, has been met. The bank did cause to be published a notice of annual meeting as required in Section 5001, General Corporation Laws affecting banks, as released in Banking Laws, State of Missouri, 1939.

"Under their procedure, can they qualify, and may this office acknowledge qualification by issuance of a certificate?"

In the above quoted letter you have disclosed that a state chartered bank in Missouri has attempted to increase its capital stock by declaring a stock dividend without following the procedure outlined in Section 7973, R. S. Mo. 1939, which section is applicable when any such corporation desires to increase its capital stock. Section 7973 of Article 2, Chapter 39, R. S. Mo. 1939, sets forth the procedure to be followed by banks operating in this state when they desire to increase their capital stock. For the purpose of this opinion, we assume that the shares of stock to be issued by the Washington County Commercial Bank partake of a character which would result in a increase of capital stock in an amount over and above that provided for in its articles of incorporation. This being so, the banking corporation must find its authority for such increase, as well as the procedure to be followed in making such an increase, in the language contained in Section 7973, R. S. Mo. 1939.

Hon. H. G. Shaffner

In your opinion request it is stated that "none of the provisions as provided in Section 7973 * * * has been met." At the very outset we are confronted with two general rules which are stated as follows, 7 Am. Jur., Banks, Section 39:

" * * * A banking corporation organized under a state statute may likewise increase its capital stock, but the mode provided by the statute must be strictly followed. Accordingly, where the charter of a state bank does not provide for an increase of its capital and there has been no amendment thereto authorizing an increase, any attempt on the part of the corporation to increase the stock in excess of the authorized capital is ultra vires and stock issued by reason of such attempted increase is void. * * * "

Section 7973, R. S. Mo. 1939, clearly outlines the duties of the Commissioner of the Division of Finance relative to the actions of a state banking corporation seeking to increase its capital stock. The statute is not ambiguous and the Commissioner is not authorized thereunder to issue a certificate of compliance to the banking corporation unless and until there has been filed in his office a signed and verified statement made by the officers of such banking corporation disclosing that all requirements of the statute have been met. It is apparent from the facts set forth in the request for an opinion that the provisions of the statute have not been followed.

CONCLUSION

It is the opinion of this department that the Commissioner of the Division of Finance of the State of Missouri is not authorized to issue a certificate of compliance to a state chartered bank, required by Section 7973, R. S. Mo. 1939, unless and until such banking corporation can certify that all of the applicable provisions of the aforesaid statute have been met.

Respectfully submitted,

APPROVED:

JULIAN L. O'MALLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JLO'M:VLM

BANKS--TRUST COMPANIES holding : The Division of Finance may demand,
real estate. : under the terms of sub-section (2)
: of Sec. 7904, R.S. Mo. 1939, that
: banks or trust companies holding real
: estate contrary to Secs. 7951 & 8031,
: R.S. Mo. 1939, cease and desist from
: such practice. The Division has no
: power to compel such corporations to
: dispose of real estate unlaw-
April 18, 1950 : fully held by them. The State
: by the Attorney General alone
: may proceed in such cases.

Honorable Harry G. Shaffner
Commissioner
Division of Finance
Department of Business and Administration
State of Missouri
Jefferson City, Missouri



Dear Commissioner Shaffner:

Your letter of recent date requesting an opinion
from this Department reads as follows:

"In Banking Laws, Missouri, 1939, there
is contained Section 7951, as applied to
banks, and Section 8031, as applied to
trust companies, which refer to the re-
strictions on taking and holding other
real estate by banks and trust companies.

"In the past in the case of this Division,
all banks and trust companies, with one ex-
ception, have disposed of real estate as re-
ferred to in these sections by the time of
the expiration of the six year period. The
one exception is a trust company which con-
tinues to carry on its books a parcel of
real estate which is not occupied as its
business quarters.

"What recourse has this Division in enforc-
ing the requirement that the real estate be
disposed of whether that real estate has been
taken in settlement of a debt due it or as a
result of consolidation with another institu-
tion which resulted in its moving from the pre-
viously occupied quarters?"

The particular question submitted in your letter for
our consideration and upon which you request an opinion is,

Honorable Harry G. Shaffner

what recourse does your Division have to compel banks, or trust companies doing a banking business, to dispose of real estate held by them in violation of the terms of Sections 7951 or 8031, R.S. Mo. 1939. Sub-section (2) of Section 7904, R.S. Mo. 1939, reads as follows:

"Whenever it shall appear to the commissioner, from any examination made by him or his examiners, that any corporation subject to the provisions of this chapter, or any foreign corporation licensed by the commissioner to do business under this chapter, has violated its charter or any law, or is conducting its business in an unsafe or unauthorized manner, the commissioner shall, by an order direct the discontinuance of such illegal and unsafe or unauthorized practices, and strict conformity with the requirements of the law, and that it proceed with safety and security in its transactions, and he may order the delinquent to appear before him, at a time and place fixed in said order, to present any explanation in defense of the practices directed in said order to be discontinued."

The above quoted sub-section of said Section 7904 prescribes the only action to be taken by the Division of Finance in case such facts are brought to the knowledge of the Division as constitute any violation of said Sections 7951 or 8031. Said sub-section does not, nor does any section of our statutes, confer power upon the Division of Finance to compel a banking corporation violating said Sections 7951 or 8031, to dispose of the real estate unlawfully held by the corporation. In the case of State ex rel. Banister et al. vs. Cantley, Commissioner of Finance, et al., 52 S.W. (2d) 397, our Supreme Court had occasion to discuss and determine, among the issues in the case, the powers and the extent of the powers of the Commissioner of Finance. The Court, l.c. 398, very tersely, on the point, said:

"The functions of the finance commissioner, like any other official, are limited to the powers and duties imposed upon him by the statute which creates the office. 46 C.J. 1031; State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 208 S.W. 445; Lamar Township v. City of Lamar, 261 Mo. loc. cit. 189, 169 S.W. 12, Ann. Cas. 1916D, 740.

Honorable Harry G. Shaffner

"An official such as the finance commissioner has no implied powers except such as are necessary to the effective discharge of the powers expressly conferred. 46 C.J. 1032."

Of course, we may assume that there may be instances where a banking corporation or trust company will refuse to comply with the direction of the Division of Finance made under said sub-section (2) of said Section 7904, to cease and desist from the violation of either of said sections, as the case may be. Upon the discovery of facts and conditions showing the violation by a banking corporation or trust company of the terms of either of said sections and their refusal to obey the order to stop the practice it would be the duty of the Division of Finance to submit such facts to the Attorney General for his consideration for the filing of any proceeding against such corporation for such violation, as the facts and the law might warrant. The Attorney General is the legal advisor, under the terms of our statutes, of all state officers, both elective and appointive, and is required by law to file all civil suits and actions and other proceedings at law, or in equity, in any Court on behalf of the State. Section 12901, R.S. Mo. 1939, in that behalf, states:

"The attorney-general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved."

The charter of a banking corporation or a trust company corporation doing a banking business is a contract between the corporation and the State. 14 C.J., page 161, so stating, has the following text:

"The charter of a corporation, whether it is created by a special act or formed under a general corporation law, is a contract between the

Honorable Harry G. Shaffner

corporation, or the corporators or members,
and the state. * * * ."

Our Supreme Court in the case of State ex rel. Wabash Railway Company vs. Roach, Secretary of State, 267 Mo. 300, one of the many decisions of our Supreme Court so holding, ruled the same way where the Court, l.c. 313, said:

"This valuable right of doing an intrastate railroad business was a grant which the State could make. In other words, it was a proper subject-matter of a contract between the State and corporation. The charter of a corporation is its contract with the State. Gantt, J., in Mathews v. Railroad, 121 Mo. l.c. 310, said:

"It is wholly unnecessary to review the decisions which sustain the view adopted in the Dartmouth College case (4 Wheat. 518), that defendant's charter is a contract between it and the State. It has been uniformly followed by this court."

The State alone may take advantage of the breach upon the part of a corporation of its said contract with the State. In a very early day in the history and jurisprudence of this State our Supreme Court in the case of Bank of the State of Missouri vs. Merchants Bank of Baltimore, 10 Mo. (123) reprint page 84, established as the rule then, and the rule to-day, in this State, that the State alone may proceed against a corporation for violation of its charter. The Court in that case (130) reprint page 88, said:

"* * * A violation of the charter of the bank cannot be taken advantage of collaterally or incidentally, but must be brought up and enforced by a direct proceeding instituted for that purpose against the corporation. * * * ."

The case of Hall, et al. vs. Bank, et al., was considered by the Supreme Court of Missouri in 145 Mo. 418. One of

Honorable Harry G. Shaffner

the questions before the Court was, whether a deed of real estate to the bank, admittedly ultra vires, was void or voidable. The Court on the point, l.c. 425, holding that the State only may question such a transaction, said:

"If a corporation takes land by grant, which by its charter it can not hold, its title is good against third persons and strangers; the State can only interfere.' 1 Perry on Trusts (4 Ed.), sec. 45. In National Bank v. Matthews, 98 U.S. loc. cit. 628, it is said: 'Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.' * * * ."

The legal proceeding to be filed on behalf of the State would be an information in the nature of a quo warranto against a corporation violating the terms of either of said Sections, 7951 or 8031. This could only be done by the Attorney General. Our Supreme Court in the case of State ex inf. McAllister, Attorney General, ex rel. Greenwell, et al. vs. Albany Drainage District, 290 Mo. 33, so held, l.c. 56, where the Court said:

"* * * That the Attorney General, without leave, has the right, at any time, to file in the Supreme Court an information in the nature of a quo warranto, in any matter in which the public interest is involved, is too well established to admit of controversy."

Section 12901, R.S. Mo. 1939, is the same, enlarged in scope and language, as was Section 4943, R.S. Mo. 1899, defining the duties of the Attorney General. Our Supreme Court in the case of State ex rel. Mo. Pac. Ry. Co. et al. vs. Williams, Judge, 221 Mo. 227, had occasion to compare and distinguish the respective duties of the Attorney General and Circuit Attorney of St. Louis and Prosecuting Attorneys of the several Counties of the State. In the course of its opinion the Court emphasized its holding that all litigation on behalf of the State must be conducted by the Attorney General. The Court, l.c. 261, said:

Honorable Harry G. Shaffner

"The duties of the Attorney-General are defined by statute * * * and a careful reading of section * 4943, Revised Statutes 1899, will, we think, demonstrate that the law-making power charged the Attorney-General with the duty of conducting all litigation on behalf of the State, * * *."

The above authorities, we believe, conclusively show that the Division of Finance has no recourse in enforcing the requirement that real estate be disposed of by a banking corporation or a trust company holding such real estate in violation of either Section 7951 or Section 8031, other than the advisory steps permitted to be taken by the Division under sub-section (2) of said Section 7904, but that the remedy for such violations, if any, belongs exclusively to the State and must be enforced for the State by the Attorney General. This would be true, we believe, "whether that real estate has been taken in settlement of a debt due it or as a result of consolidation with another institution which resulted in its moving from the previously occupied quarters," or under any other circumstances which would constitute a violation of either of said sections.

CONCLUSION.

It is, therefore, considering the above authorities, the opinion of this Department that:

1) The Division of Finance of the Department of Business and Administration of the State of Missouri has no power to enforce the requirement that real estate unlawfully held by a banking corporation or a trust company corporation doing a banking business be disposed of, other than the advisory measures to be taken under said sub-section (2) of said Section 7904.

2) That the remedy to be pursued against any such corporation belongs exclusively to the State and may only be instituted and prosecuted for the State by the Attorney General.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

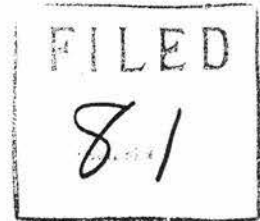
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BANKS:
USE OF FUNDS FOR
LIFE INSURANCE:

A bank may not use its funds for the payment of insurance on the lives of persons who are not employees or officers of the bank, and in whose lives it has no insurable interest.

April 20, 1950

Honorable Harry G. Shaffner
Commissioner of Finance
Department of Business and Administration
Jefferson City, Missouri



Dear Commissioner Shaffner:

This will be in response to your recent request for our opinion on the question whether a bank may lawfully appropriate and use funds of the bank in payment for premiums on two life insurance policies for persons who are not employed in the bank, but are members of a family which owns a majority of stock in the bank.

Your letter requesting the opinion reads as follows:

"A state chartered bank is now paying the premiums on two life insurance policies for persons who are not employed by the bank but are members of a family which owns a majority of stock. They do report that while the parties are not employees they are potential employees and sooner or later it will become necessary that they assume the responsibility of a part of the bank's operations. The policies are payable to the bank as beneficiary, though each policy reads subject to change of beneficiary. The policies are held by the bank.

"I have advised the institution that such an expense is not incident to the operation of a bank and should not be so treated. Is such an expense bona fide or could it be termed an investment for the bank?

"May I be favored with an opinion?"

It appears from your letter that you have advised the bank in question that the use of the money of the bank for the payment

Honorable Harry G. Shaffner

of premiums on the two life insurance policies named in your letter is not incident to the operation of the bank and should not be so treated. We believe your position is correct and that your advice to the bank, in effect, that such use of the funds of the bank would be entirely unauthorized, was prudent and proper.

The grounds upon which we base our opinion that the use of the funds of the bank for such purposes is improper and unlawful, is that our statutes, the decisions of our Supreme Court and Courts of Appeals, the Courts of every State in the Union, so far as we may learn, and the textwriters of the law as well, uniformly say that a person or corporation cannot take out a valid and enforceable policy of insurance for his or its own benefit on the life of a person in which he or it has no insurable interest; that such a policy is void and unenforceable on grounds of public policy, and constitutes a wagering contract. (37 C.J., pages 385, 386).

Our statutes are positive in prohibiting the taking out by a person or corporation insurance on the life of another in which such person or corporation has no insurable interest.

Section 5882, Article IV, Chapter 37 of the Insurance Code of this State, R.S. Mo. 1939, reads, in part, as follows:

"No corporation, company or association transacting business under the provisions of this article shall issue a certificate or policy to any person until the applicant has been examined by a physician duly licensed and appointed by the company as its medical examiner, nor unless the beneficiary named in the certificate or policy is the husband, wife, legal representative, relative, heir, creditor or legatee of the insured, or who may have an insurable interest in the insured.
* * *."

Treating of the right of a corporation to take out insurance on the lives of its officers or employees, and pointing out the circumstances and conditions which must exist to authorize the taking out of such insurance, and the conditions and circumstances, on the other hand, where the taking out of such insurance is unauthorized, 37 C.J., pages 396, 397, states the following text:

"A corporation has an insurable interest in the life of its president, general manager, principal stockholder, or other person or officer where by reason of his ability, knowledge, skill, and experience the success of

Honorable Harry G. Shaffner

the business of the corporation is largely dependent on his efforts, and the policy is taken out in good faith for the purpose of protecting the corporation against loss in the event of his death. However a corporation does not have an insurable interest in the life of a director merely by virtue of his position as such and in the absence of additional circumstances; an association or society is held to be without insurable interest in the life of a member or a stockholder; and in order that an individual employer may have an insurable interest in the life of an employee it must appear that his continued employment is necessary to the profitable operation of the work in which he is engaged, and that his death would result in substantial loss to the employer."

In the case you cite it is frankly stated that the two persons upon whose separate lives the insurance policies have been taken out by the bank are not employed by the bank. This, under our said Section 5882, supra, would render the policies void as against public policy, from the beginning. It will not do to say that it is enough to validate such policies, that the time may arrive when the two persons whose lives are thus insured may assume responsibility of a part of the bank's operation. That is pure speculation. It supports completely the theory and statement of law that such contracts made by the bank without an insurable interest in the lives of the persons insured are wagering contracts, and void as against public policy. The text of Corpus Juris quoted states that, a corporation does not have an insurable interest in the life of a stockholder. Footnotes 47, 48 and 49 in citing cases, fully support the text quoted on the point. Footnote 47(b) to the text quoted, 37 C.J., pages 397, states:

"(b) A building association has no insurable interest in the life of a stockholder not indebted to it. Tate v. Commercial Bldg. Assoc., 97 Va. 74, 33 S.E. 382, 75 Am. SR 770, 45 L.R.A. 243."

Footnote 49(a), same volume, same page, states the following:

"(a) The cessation of ordinary service would not result in substantial loss, within the meaning of the rule. United Security I. Ins., etc., Co. v. Brown, 270 Pa. 270, 113 A. 446."

In cases where an insurance policy is taken out by a corporation on the lives of its actual employees, the Courts hold that the

Honorable Harry G. Shaffner

corporation must have a pecuniary interest in the continuance of the life of the employee, and that his death would constitute a financial loss to the corporation. In the case of Singleton vs. Insurance Co., et al., 66 Mo. 63, l.c. 74, upholding this rule, our Supreme Court said:

"* * * We feel constrained, therefore, by the weight of authority to hold that the policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy, and therefore void,
* * * ."

It seems to have been so generally understood and agreed that such insurance is void as against public policy, that no case going into a full discussion of the different features of such a contract of insurance has ever been submitted to our Appellate Courts for decision as to what would constitute an insurable interest upon the part of an employer in the life of his employees. The high courts of other States have considered, discussed and decided the question. One of the most clearly discussed and reasonably ruled cases on this subject coming to our attention is the case of Turner vs. Davidson, et al., a Georgia case, reported in 4 S.E. (2d) 814. This case holds that an employer must have a substantial economic interest in the life of his employee and expect to obtain a substantial pecuniary benefit through the continued life of the employee and sustain consequent loss upon his death to render lawful the taking out of an insurance policy on the life of such employee by the employer to protect his interests. So holding, at l.c. 816, 817, the Court said:

"* * * Accordingly, it may be taken as settled in this case that an employer does not have an insurable interest in the life of his employee solely because of the relationship of employer and employee; * * * * *
As a general rule, a reasonable expectation of pecuniary gain or advantage through the continued life of another person and consequent loss by reason of his death, creates an insurable interest in the life of such person. * * * An employer does not prima facie have an insurable interest in the life of his employee; and it would seem that, for such to be shown, it should appear that from the nature and character of the employment and the services rendered, their importance to the business conducted, and the character

Honorable Harry G. Shaffner

and particular ability of the employee, his death would be reasonably expected to result in substantial pecuniary loss to the employer. A small and insignificant economic readjustment which would normally follow the death of an employee performing ordinary duties requiring no special skill or knowledge would not give the employer an insurable interest in the life of his employee. In *United Security Life Ins. & Trust Co. v. Brown*, 270 Pa. 270, 113 A. 446, it was said: 'To sustain an insurance contract insuring an employee's life, it must appear that the employee securing the policy has a real concern in the life of the party named, whose death would be the cause of substantial loss to the business, and this does not follow the cessation of ordinary service such as that of a manager of a storage house owned by the beneficiary, but arises where the success of the business is dependent upon the continued life of the employee.' See also *Murray v. Higgins Co.*, 300 Pa. 341, 150 A. 629, 75 A.L.R. 1360. Thus where it appears that an employer has a substantial economic interest in the life of his employee, that is that he might be reasonably expected to reap a substantial pecuniary benefit through the continued life of such employee, and sustain consequent loss upon his death, a policy of insurance taken out by him in good faith to protect his interest in the employee should be upheld."

It appears that the facts and conditions recited in your letter come strictly within the terms of the Georgia case cited, supra, and possess none of the elements upon which the bank referred to may take out a policy of insurance on the lives of the two persons who at most are said to be merely prospective employees of the bank.

The use of the funds of the bank for such purpose when the insureds were not employees of the bank at the time the policies of insurance were written, constitutes a legal fraud upon the minority stockholders of the bank and could not be bona fide nor be considered an investment for the bank. Such acts are ultra vires, and even though small in sum and value, constitute a misappropriation of the funds of the bank and might well be, if continued, the basis for the State to sue to cancel and revoke the charter of the bank, or at least, remove the officers and directors of the bank who continue the wrong.

Honorable Harry G. Shaffner

CONCLUSION

It is, therefore, the opinion of this Department that the use of funds of a bank to pay premiums on two life insurance policies for persons who are employed in the bank, but are members of a family which owns a majority of the bank stock, even though such parties are said to be potential employees and sooner or later will become affiliated with the bank and assume the responsibility of a part of the bank's operation, is not an authorized expense, incident to the operation of the bank, and hence is ultra vires and unlawful.

Respectfully submitted,

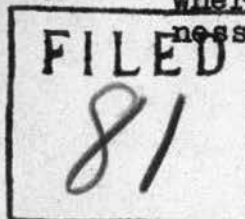
GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BANKS--holding real estate: Banks are authorized by the Constitution and statutes of Missouri to transact or permit the transacting of a safe deposit business in an adjoining room to the banking quarters, both being parts of one building, under their right to hold such real estate as is necessary and convenient to the transaction of their business, even though there is no inside entrance or door between the banking quarters and the room where the safe deposit business is transacted.

May 3, 1950



5/4/50

Honorable H.G. Shaffner
Commissioner
Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Commissioner Shaffner:

This is in reply to your letter requesting an opinion upon the subject-matter contained in your letter which reads as follows:

"A state chartered bank has an affiliated interest which has among its purposes that of giving safe deposit service. This affiliated interest is incorporated and located in a room considered the bank building, from which no inside entrance can be made to the banking quarters.

"Since many banks carry on their safe deposit business within the recognized banking quarters, can the use of this room in this manner be considered other real estate?"

It will be observed by reading Section 5 of Article XI of the present Constitution of this State, respecting the right of corporations, (including banking corporations), to hold real estate and the restrictions against corporations, (including banking corporations), holding real estate, that its terms permit the perpetual holding of such real estate as is necessary and proper for carrying on the business of such corporations; and that such rights are restricted, as to other real estate, to holding of such other real estate for ten (10) years or such longer period as may be provided by general law, including such real estate as may be acquired in payment of a debt, under foreclosure or otherwise, and real estate exchanged therefor. Said Section 5 reads as follows:

"No corporation shall engage in business other than that expressly authorized in its charter

Honorable H. G. Shaffner

or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided, that any corporation may hold, for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor."

Section 7949, Article 2, Chapter 39, R.S. Mo. 1939, provides the authority for the exercise of rights and powers of banks in this State. Among the provisions of sub-section 5 of said Section 7949 there are the following:

"To purchase, hold or convey real property for the following purposes:

"(a) A plot whereon there is or may be erected a building or buildings suitable for the convenient transaction of its business from portions of which not required for its own use a revenue may be derived."

These provisions from our Constitution and statutes make clear and remove entirely from doubt the right of a banking corporation to acquire and hold real estate for the necessary and convenient transaction of its business. We do not understand your letter as questioning the right of a banking corporation to hold real estate for the necessary and convenient transaction of its business affairs, but your letter does submit the question of whether a room, in which an affiliate of a banking corporation is carrying on a part of the business, authorized by the statutes for it or for banks to carry on, which does not have an entrance or passageway between the room where the banking business proper is carried on and the room where such other business is carried on, should be considered real estate other than the bank has the right to hold as its place of business.

Your letter, in the last paragraph, states the following question:

"Since many banks carry on their safe deposit business within the recognized banking quarters, can the use of this room in this manner be considered other real estate?"

Honorable H. G. Shaffner

We believe under its constitutional and statutory power to hold such real estate as is necessary and convenient in the transaction of its business, a banking corporation may itself transact any business the statutes permit such bank to transact, or permit an affiliate to transact such business, in a building upon real estate the bank has constituted its banking house. That a bank does possess the power and authority to transact, in the banking house, where the bank carries on its banking business, the safe deposit business, is made plain by our statutes. Sub-section 4 of said Section 7949 giving this power to banks reads, in part, as follows:

"To purchase and hold the stock of any safe deposit company organized and existing under the laws of the state of Missouri and doing business on premises owned or leased by the bank: Provided, that the purchasing and holding of such stock is first duly authorized by resolution of the board of directors of the bank and by the written approval of the commissioner stating the number and amount of the shares which the bank may purchase and hold, such amount not to be less than ninety per cent of the total and not to be sold or transferred except as a whole and not to be pledged at all. * * * ."

This provision, we believe, means that, presupposing a safe deposit company was transacting business in some part of the bank's banking house and lawful place of carrying on its banking business on real estate so owned or leased by the bank, the bank would have the right to purchase and hold all of the stock of the safe deposit corporation and lawfully and properly continue the business itself. Original power also to organize to transact a safe deposit business by banks is provided in Section 8127, Article 5, Chapter 39, R.S. Mo. 1939, which reads, in part, as follows:

"Any bank, trust or safe deposit company organized under the laws of this state, whose capital is fully paid up and unimpaired, may, with the consent of all its stockholders, accept the provisions of this article by filing with the commissioner a certificate of such acceptance, signed by its president and secretary. The consent of the stockholders to such acceptance may be in writing, or by vote of the stockholders

Honorable H. G. Shaffner

at any meeting at which all the stockholders are represented, and vote in favor of such acceptance. Upon filing of such certificate of acceptance, such corporation shall thereupon become subject in all respects to the provisions of this article, and to the general laws of this state relating to corporations, with like effect as if it had been originally incorporated under the provisions of this article; * * *."

Your letter very frankly states that the bank in question has an affiliated interest which proposes to give a safe deposit service, and that said affiliated interest is incorporated in a room considered the bank building from which no inside entrance can be made to the banking quarters. Then your question follows, whether this may be considered "other" real estate.

We understand that it is meant, where your letter states that a safe deposit business is to be carried on by the affiliate of the bank in a room "considered" the bank building, that the bank does actually own the building in which the affiliate proposes to carry on the safe deposit business. So understanding, it is plain, we believe, from reading the sections of the statutes quoted that the bank has the right to carry on this business itself, either by accepting the provisions of Article 5, as it may do under said Section 8127, supra, to carry on a safe deposit business, or by the purchase of the controlling stock under the terms of sub-section 4 of Section 7949, supra, of a safe deposit company already transacting such business. In either event, the fact that there is no door or inside entrance between the room where the safe deposit business is to be carried on, or is carried on, and the main banking room, or quarters, of the bank, would not preclude the bank or a safe deposit corporation affiliated with the bank from carrying on such safe deposit business, and the room where such safe deposit business is carried on would not, and could not, by reason of such fact be considered "other" real estate apart from the bank building. It must necessarily be considered, and is, we think, a part of real estate which the bank has the lawful right to acquire and hold in the necessary and convenient transaction of its business, including such safe deposit business, notwithstanding there is no opening between the two rooms.

CONCLUSION

In view of the powers given to banks to hold such real estate as is necessary and convenient in the transaction of their business by authority of the above cited and quoted

Honorable H. G. Shaffner

sections of our Constitution and sections of the statutes, it is the opinion of this Department that a room, where an affiliate of a State chartered bank transacting, and proposing to transact, a safe deposit business, which is a part of the real estate owned by the bank, is not other or separate real estate from real estate which a bank is authorized by law to hold, for the transaction of its business merely because there is no door or inside entrance from the bank room proper into the room where a safe deposit business is carried on.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

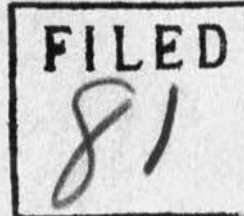
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OFFICERS: Same person may hold office of city
SPECIAL ROAD DISTRICTS: manager and special road district
MUNICIPAL CORPORATIONS: commissioner.

May 9, 1950

5/15/50

Honorable Samuel E. Semple
Prosecuting Attorney
Randolph County
Moberly, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Mr. H. P. Phelan, City Manager of Moberly, Missouri, has requested me to obtain an opinion from your office concerning his status as city manager of the City of Moberly, Missouri, and also serving on the Board of Commissioners of the Moberly Special Road District. Mr. Phelan was recently appointed city manager and has been on the Board of Commissioners of the Road District since 1948.

"I would like to obtain an opinion of your office as to whether or not he can legally hold both positions at the same time."

At the outset, it must be determined whether the positions of commissioner of a special road district and city manager of a city of the third class are offices because "the question of incompatibility does not arise when one of the positions is an office and the other is merely an employment." (46 C. J. 943.) In State ex rel. Pickett v. Truman, 333 Mo. 1018, 64 S.W. (2d) 105, the Supreme Court of Missouri, en Banc, said at l.c. 106:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2)

Honorable Samuel E. Semple

definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. * * *

Applying the above test to a commissioner of a special road district, we find that a commissioner is appointed for a term of three years and takes an oath of office (Section 8675, R.S. Mo. 1939); that the duties imposed by law involve the exercise of the sovereign power (Sections 8682 and 8683, R.S. Mo. 1939); that he has continuing and permanent duties (Section 8682), and his successor in office has the right to his powers, duties and emoluments (Section 8675). Therefore, a commissioner of a special road district is an officer.

In regard to a city manager of a city of the third class under city manager form of government, Section 7089, R. S. Mo. 1939, provides that he shall have a term of office not to exceed one year; that he shall take an official oath; and that he has the duty to see that the laws and ordinances are enforced. Section 8088, R.S. Mo. 1939, provides that certain officers and employees of the city may be employed and discharged by the city manager. In view of these duties, it will be seen that the city manager is a public officer.

The rule in this state as to whether a person may hold two offices at the same time is given in State ex rel. McGaughey v. Grayston, 349 Mo. 700, 163 S.W. (2d) 335, as follows:

" * * * The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

Honorable Samuel E. Semple

The principal case in Missouri upon this question is State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, in which the court, through Judge MacFarlane, said at l.c. 338:

" * * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

We must, therefore, look to the duties of the two officers in order to determine whether there is such an incompatibility that one person cannot hold both offices at the same time. Section 7089, supra, provides for a city manager of a city of the third class and sets forth his duties. Said section provides, in part, as follows:

" * * * He shall be the administrative head of the government subject to the direction and supervision of the council
* * * It shall be his duty - (a) To make all appointments to offices and positions provided for in section 9298j. (b) To see that the laws and ordinances are enforced. (c) To exercise control of all departments and divisions that may hereafter be created by the council. (d) To see that all terms and conditions, imposed in favor of the city on its inhabitants in any public utility franchises are faithfully kept and performed, and upon information of any violation thereof to take such steps as will be necessary to stop or prevent the further violation of the same. (e) To attend all meetings of the council with the privilege of taking part in the discussions but having no vote. (f) To recommend to the council for adoption such measures as he may deem necessary or expedient. (g) To prepare and submit the annual budget and to keep the city council fully advised as to the

Honorable Samuel E. Semple

financial conditions, and needs of the city and to perform such other duties as may be prescribed by this article or be required of him by any ordinance or resolution of the council."

Section 8682, supra, sets forth the powers and duties of the board of commissioners of a special road district, and provides as follows:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

Section 8683, supra, imposes the further authority upon the board:

" * * * to expend not more than one-fourth of the revenue which may now or which may hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city within said special road district in conformity with the established grade of said roads and streets in said cities and for the purpose of constructing and maintaining macadam, gravel, rock or paved roads or streets within the corporate limits of any city within the said special road district in conformity with the established grade of said roads and streets in said city:
* * *"

Honorable Samuel E. Semple

From a reading of the above sections relating to the duties of the two officers, the only possible incompatibility which might arise is when the board of commissioners of the special road district must determine how much of the revenue of the road district should be spent in the city of Moberly. However, as pointed out in the Bus case, supra, at l.c. 339:

" * * * We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. State ex rel. v. Goff, 15 R. I. 507."

Therefore, we are of the view that there is no incompatibility between the duties of the two offices and such offices may be held at one time by one person.

CONCLUSION

It is the opinion of this department that there is no incompatibility between the office of city manager of a city of the third class and the office of a commissioner of a special road district, and that such offices may be held by the same person.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

(AMO'K)

BANKS:

State chartered banks and trust companies prohibited under Section 7953 and Section 8033, R. S. Mo. 1939, from employing moneys in purchasing lease agreements, without recourse, unless the same are taken as collateral security for a loan.

May 31, 1950



Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in compliance with your recent request which reads as follows:

"It has been found among the assets of state chartered banks and trust companies that they at times include lease agreements which cover the purchase of various types of heavy road equipment, etc. The machinery, of course, is in the possession of the county and it seems the county will eventually get title to the equipment after full payment is made.

"This Division and the Examiners have taken the stand that under such an agreement the bank has title to the machinery until all provisions of the lease agreement are made which are concluded at the time of final payment. We further consider that this method of handling is in direct violation of Section 7953, Banking Laws, Missouri, 1939.

"One such bank who has serviced these lease agreements has had their attorney pass on the bank's position. A copy of the attorney's letter is herewith enclosed."

Subsequent to the date this office received the opinion request quoted above, you have furnished us with copies of the lease agreement with option to purchase, blank bill of sale and assignment of lease contract, all of said instruments bearing directly on the commercial practice being engaged in by the state chartered

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bank. The question to be determined in this opinion is whether a state chartered bank or trust company may purchase the lease agreement, take an assignment thereof without recourse and accept a bill of sale to the property described therein in view of the provisions of Section 7953, R. S. Missouri, 1939, which provides:

"No corporation now existing, nor any hereafter organized under any law of this state, whether general or special, as a bank, or to carry on a banking business, shall employ its moneys, directly or indirectly, in trade or commerce by buying and selling ordinary goods, chattels, wares and merchandise, or by owning or operating industrial plants: Provided, that it may sell all kinds of property which may come into its possession as collateral security for loans, or in the ordinary collection of debts."

Appended to this opinion are copies of the lease agreement, assignment of the lease contract and bill of sale, all being necessary to complete the action being considered. Appropriate reference will be made to these instruments in the course of remarks made herein.

Section 7953, R. S. Missouri, 1939, is found in the special statutes applicable to state chartered banks. The statute has its counter-part in the law applicable to state chartered trust companies and is to be found at Section 8033, R. S. Missouri, 1939, which provides:

"No trust company shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling ordinary goods, chattels, wares and merchandise, or by owning or operating industrial plants: Provided, that it may sell all kinds of property which may come into its possession as collateral security for loans, or in the ordinary collection of debts."

Due to the similarity of Section 7953 and Section 8033, R. S. Missouri, 1939, it is unnecessary to make separate reference hereinafter to limitations imposed by such statutes on banks and/or trust companies.

We first dispose of the proviso contained in the statutes being construed. The prohibitions contained in the statutes are not effective to prohibit the sale, by the banking corporation, of "all

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kinds of property which may come into its possession as collateral security for loans, or in the ordinary collection of debts." None of the facts disclosed in the opinion request, including its enclosure, intimate that the lease agreement, the assignment thereof and the bill of sale acquired by the banking corporation came into its possession in the course of ordinary collection of debts.

This being so, we at once eliminate the proviso in the statutes as a factor to be further considered in this opinion. By taking the instruments in question for valuable consideration, has the banking corporation employed its moneys, directly or indirectly, in trade or commerce by buying and selling ordinary goods, chattels, wares and merchandise in violation of the statutes being construed? The vital characteristics of the instruments giving life to the transaction must be considered. The lease agreement is entered into by E. A. Martin Machinery Company, a corporation, lessor, with the County Court of Greene County, Missouri, as lessee. By fulfilling the terms of the lease agreement, Greene County may exercise the option to purchase contained therein and acquire title to the property it is to use on a rental basis until option to purchase is exercised. As between the lessor and lessee, title to the equipment remains in the lessor under the lease agreement. In executing an assignment of the lease contract to the bank, without recourse, and executing the delivering to the bank a bill of sale affecting the property described in the lease agreement, the lessor has in effect transferred all its right, title and interest in the lease agreement to the bank for the valuable consideration stated in the bill of sale.

Under the facts we can certainly not say that the bank is acting as agent for the lessor of the equipment with authority limited to accepting rental payment from Greene County under the lease agreement. Nor, can we say that the bank's present interest in the property came by reason of the property being collateral security for any loan advanced to the lessor or lessee. Stated simply, the bank is employing its moneys in trade or commerce by taking title to ordinary chattels without the same being taken as collateral for loans.

CONCLUSION

It is the opinion of this office that state chartered bank or trust company violates the express provisions of Section 7953 and Section 8033, R. S. Missouri, 1939, when either employs its moneys in purchasing lease agreements containing options to purchase personal property described therein, such purchases being affected by taking an assignment of the lease agreement, without

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recourse, accompanied by a blank bill of sale from the lessor, without such assignment being taken as collateral security for a loan.

Respectfully submitted,

JULIAN O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CORPORATIONS)

Trust company may extend corporate existence although
) not engaged in trust business.

June 6, 1950



Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department,
which request is as follows:

"This Division has been approached to extend the charter of the Missouri Lincoln Trust Company, St. Louis, Missouri. This trust company was chartered by this Division on September 12, 1900, for a period of fifty years, making the charter expire on September 11, 1950.

"The Mercantile Trust Company, St. Louis, Missouri, on September 23, 1907, purchased the assets and assumed the liabilities of this trust company. It is admitted that all deposit and trust liability has been paid in full; the only interest now remaining is that of the shareholders.

"It seems that certain of the shareholders have held their annual meeting and elected directors and officers, though we fail to find in this office where we have received the oaths of directors in any of the years since 1907.

"May we be favored with an opinion regarding the responsibility of this Division in the request of an extension of the charter. It has been said that in case the charter is extended that the persons interested will agree that the charter will not be used for any other purpose than in the course of the final liquidation to shareholders."

Honorable H. G. Shaffner

Provision for extension of the period of corporate existence of trust companies is made by Sections 8052 and 8053, R. S. Missouri, 1939. After the preliminary action has been taken by the corporation, the Commissioner of Finance is required to issue his certificate when he is satisfied that there has been a compliance in good faith with all the requirements of the law relating to the extension of corporate existence.

We enclose herewith copy of an opinion of this department dated November 29, 1948, and addressed to Honorable Edgar C. Nelson, in which we concluded that the sale by a bank of all of its assets does not terminate the corporate existence of the bank, and that such bank still maintains and enjoys its corporate existence under the charter granted by the State of Missouri. That conclusion is, we feel, applicable in the present situation. The Missouri Lincoln Trust Company has never terminated its corporate existence and the sale of its assets did not have the effect of doing so.

Inasmuch as the Missouri Lincoln Trust Company has maintained its corporate existence following the sale of its assets, we feel that for the purpose of permitting it to liquidate the interests of its shareholders, it should be permitted to extend its existence upon compliance with the requirements of Sections 8052 and 8053. We perceive no public interest which might be adversely affected by permitting the extension of the corporate existence at this time. Although the corporation has not exercised its functions as a trust company, nevertheless, it has continued to hold assets and we see no necessity of requiring the immediate termination of the liquidation proceeding by refusing to permit the extension of the corporate existence at this time.

CONCLUSION

Therefore, it is the opinion of this department that upon the showing to the Commissioner of Finance that the Missouri Lincoln Trust Company has complied with the requirements of Sections 8052 and 8053, R. S. Missouri, 1939, relating to the extension of corporate existence, the Commissioner of Finance should issue a certificate of such extension without regard for the fact that the corporation has not for several years exercised any functions as a trust company, but is involved in holding and liquidating certain assets for the benefit of its shareholders.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General

RRW/feh

BRANCH BANKING: The making of loans, taking notes by another corporation, as agent for the bank; from the borrowers and made directly to a bank, some notes made to the other corporation and delivered to the bank without the endorsement of the other corporation, and servicing of all such notes, in a city other than the home city of the bank and in a building other than the banking house of the bank in its home city, constitute branch banking on the part of the bank.

June 15, 1950



6/13/50

Honorable Harry G. Shaffner
Commissioner of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Commissioner Shaffner:

Your letter requesting the opinion of this Department on whether the proceedings and acts of a bank chartered by the laws of Missouri as described in the letter constitute branch banking, has been received. Your letter states:

"Parties owning control in a state chartered bank have formed a safe deposit company which is understood to have been incorporated by the Secretary of State of Missouri. This company makes loans at an office located some thirty miles from the bank, in other words, out of the banking quarters.

"Persons borrowing money at the office of the safe deposit company sign notes which are payable to the safe deposit company. Advances to the borrower are drawn against funds of the lender on deposit at the bank.

"Such loans then are turned to the bank, some of which are endorsed, others not endorsed. The safe deposit company keeps a dual set of books, in which case they make collection on those loans sold and remit to the bank in the amount collected.

"We submit a copy of an agreement furnished by the bank and the safe deposit corporation in conjunction with the establishing of

Honorable Harry G. Shaffner

and the servicing of all notes which originate in the safe deposit company. There is also submitted a copy of the remarks made by the examiner who examined the bank in question so that you may get his viewpoint of such transactions.

"Can any of this procedure be considered branch banking?"

Together with your letter, documents, as informative matter descriptive of the activities of the bank observed and recited by an Examiner of your Division, and Examiners for the Federal Deposit Insurance Corporation, have been transmitted to us for reference and consideration. There is also transmitted with the named documents a copy of the contract, dated August 1, 1949, between the safe deposit corporation and others, on the one part, and the bank referred to in your letter as a State chartered bank, party of the other part, setting forth in detail the rights, privileges and obligations, moving from each to the other, in the carrying on of the business activities which constitute the basis of your request for our opinion whether such activities and proceedings constitute branch banking. The copy of the contract which you furnished is returned herewith.

Your letter advises that the safe deposit corporation makes loans at an office some thirty (30) miles from the bank.

Your letter advises that:

"Persons borrowing money at the office of the safe deposit company sign notes which are payable to the safe deposit company. Advances to the borrower are drawn against funds of the lender on deposit at the bank.

"Such loans then are turned to the bank, some of which are endorsed, others not endorsed. The safe deposit company keeps a dual set of books, in which case they make collection on those loans sold and remit to the bank in the amount collected."

The contract between the safe deposit corporation and others, on the one part, and the bank on the other part,

Honorable Harry G. Shaffner

provides that the parties agree that the bank shall continue the purchase of notes from the first parties as it has in the past been doing, and that the bank shall be given protection against losses which might occur by reason of serious criticism of the transaction between the parties by bank examiners that would result in the discontinuance of such purchases by a fund called the "Safe Deposit Company CONTINGENT FUND", said fund to be derived from all discount received, or which would be received by the safe deposit corporation or its agent, a credit company, on notes which have been, or will be, after the date of said contract, purchased by said bank from the first parties, or previously acquired by such agent whose contingent funds were transferred by them to the safe deposit corporation when such individuals became officers of said safe deposit corporation. The contract provides that said contingent fund shall be set aside by the bank on the books of the bank and become the property of and payable to the safe deposit corporation only when and to the extent that the balance in said fund exceeds the total of the then determined delinquent loans and 10% of the unpaid balances on all non-delinquent loans acquired by said bank from the sources hereinbefore mentioned, either before or after the date of the contract. It is further provided in said contract that losses on notes (from any cause whatsoever) and write-downs required by bank examiners on notes and any delinquent notes protected hereunder, shall be chargeable to said fund at the sole discretion of any executive officer of said bank, and such officer, or officers, shall be the sole judge of the proper time and amount of such charges. Said contract further states that it is understood that the bank shall receive a discount for its own income on notes so acquired; such discount to be fixed by mutual agreement as to each note at the time of its acquisition by said bank, and the entries made thereupon on the books of said bank shall be irrefutable evidence of the discount agreed upon.

The contract concludes by providing that if the safe deposit corporation shall, at any time, suffer a loss on a note re-purchased from the bank, the safe deposit corporation shall be reimbursed for such loss by the bank only out of the safe deposit corporation Contingent Fund, and only to the extent that said fund is not thereby reduced to an amount less than the balance of said fund sixty (60) days previous to the date of the charge.

Honorable Harry G. Shaffner

We have noted above that losses or notes from any cause whatever, write-downs, required by bank examiners on such notes, and such other notes as become delinquent shall, under the contract, be chargeable to said fund at the sole discretion of any executive officer of said bank. (Underscoring ours.) These advantages and preferences moving to the bank without any corresponding obligation upon its part to allow the use of the Contingent Fund, which is created out of the principal, if not the only, income the safe deposit corporation has, for recoupment for such losses, leaves, as we view it, the safe deposit corporation entirely without right or remedy to subject its Contingent Fund to the discharge of its losses. This, and the further requirement of the contract that write-down notes required by bank examiners and delinquent notes protected by said fund shall be chargeable to said fund at the sole discretion of any executive officer of the bank, tend very strongly to indicate that the contract in these provisions lacks mutuality because the force and effect of such terms of the contract depend entirely on the will of the bank. If there is no mutuality between the parties, with respect to these vital elements of this contract, it would be, for the want of mutuality, a unilateral contract in favor of the bank, and, therefore, void as to both parties.

"* * * There must be mutuality of agreement to give a valid contract. A written instrument which undertakes to create liability as to one party, without liability or obligation upon the other party thereto, is void as to both.* * * (Hudson et al. vs. Browning, 174 S.W. (Mo. Sup.) 393, 1.c. 396.)

These observations and authorities are here made and applied in view of the trend of the statements of fact in the documents before us, to indicate that the safe deposit corporation is merely the agent and servant of the bank, and that its acts and conduct in making loans are, in reality, the acts and conduct of the bank itself.

Referring again to the memo of October 6, 1949, in which there are recited facts developed by an examination by the Federal Deposit Insurance Corporation of the affairs of the bank and the safe deposit corporation, it is revealed therein that the said safe deposit corporation was chartered in 1946 with a capital of Five Thousand (\$5,000.00) Dollars

Honorable Harry G. Shaffner

for the purpose of conducting a safe deposit business; that on December 31, 1948, the capital stock, then owned in its entirety by the bank, was sold at its book value of Five Thousand (\$5,000.00) Dollars; that the majority directors and the majority stockholders of the bank are the majority directors and stockholders, respectively, of the safe deposit corporation.

It is further stated in said October 6, 1949, memo that the said safe deposit corporation was then, October 6, 1949, indebted to the bank in the sum of Forty-Nine Thousand (\$49,000.00) Dollars; that the safe deposit corporation has amended its charter and now has the power to make loans; that a portion of the loans originating through the said safe deposit corporation are endorsed without recourse by the corporation (presumably to the bank); and that some of the notes carried in the bank's assets were then, (October 6, 1949) made payable to the safe deposit corporation and not endorsed by it; that all delinquent obligations (notes) are removed from the bank's assets when arrearages occur.

The memo further states that the bank follows the practice of accepting notes, by way of discount, which are payable to the safe deposit corporation and not endorsed by the safe deposit corporation.

The said memorandum of October 6, 1949, written by the examiner for the F.D.I.C. disclosing that the bank accepts discounts from the safe deposit corporation in the form of notes or otherwise, is very persuasive evidence that the bank presently would be exercising no independent judgment or discretion, with respect to the performance of their bounden duty to their stockholders, and the public, but, on the contrary, show that such practices are the result of an understood plan that the safe deposit corporation is merely the agent of the bank in providing such discounts for the bank, since the directors of the safe deposit corporation, as the seller of the discounted paper, are the same persons, who are directors of the bank, which is the buyer of such paper. In other words, the directors of the bank through themselves as directors of the safe deposit corporation are dealing with themselves as a bank in such transactions. This, we believe, inasmuch as such transactions are initiated and the loans and

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discounts being made in another city, fifty miles distant from the banking house of the bank, constitutes branch banking by the bank itself through the safe deposit corporation acting as its agent.

Both letter memos of October 6, and November 1, 1949, assert that the said safe deposit corporation at Kansas City, Missouri, in making some of the loans noted, requires the notes to be made payable to the bank.

It is not, as we view the problem, a question whether the acts performed by the safe deposit corporation for the bank, such as taking notes from borrowers of money from the safe deposit corporation, payable directly to the bank, taking notes for such loans payable to the safe deposit corporation and delivered to the bank without endorsement by the safe deposit corporation, and the servicing of all notes which originate in the safe deposit corporation, whether payable to the safe deposit corporation or payable directly to the bank, are sound or unsound, safe or unsafe practices or, moreover, whether such acts in and of themselves may be considered branch banking, although such proceedings may well constitute acts of banking, but the vital inquiry here is, under the facts disclosed, as we view them, whether the bank using the safe deposit corporation as a mere pretense and screen to conceal its own acts as a bank, is itself carrying on a definite banking business outside of its own banking house. Sub-section 1 of Section 7949, R.S. Mo. 1939, defining the rights and powers of incorporated banks in this State reads as follows:

"To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and non-negotiable paper of all kinds, including bonds, as well as all kinds of commercial paper; and for all

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loans and discounts made, such corporation may receive and retain in advance the interest; Provided, however, that no bank shall maintain in this state a branch bank, or receive deposits or pay checks except in its own banking house."

Sub-section 5 of said Section 7949, empowering banking corporations to purchase real estate, and among the reasons for such provisions, one apparently was for the purpose of requiring them to have definitely located banking houses, provides that they may exercise the following powers:

"To purchase, hold or convey real property for the following purposes:

"(a) A plot whereon there is or may be erected a building or buildings suitable for the convenient transaction of its business from portions of which not required for its own use a revenue may be derived."

The United States Supreme Court in the case of *ex parte Schollenberger*, 96 U.S. Rep. 369, construed a statute relating to where a corporation could be served with process. In the opinion, l.c. 377, the Court had this to say:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter. * * * ."

Our Supreme Court in the case of *State ex rel. Barrett vs. First National Bank of St. Louis*, 297 Mo. Rep. 397, was considering a case respecting a national bank maintaining a branch bank in this State under the National Bank Act. In determining the case, and in holding that a bank may only maintain and operate one banking house, the Court, l.c. 406, said:

"This location (of the principal office) having been established, it is within the contemplation of the statute that the power of the bank is to be there exercised. Otherwise the words 'an office or banking house'

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ceased to be specific and instead of being singular in number may be construed as plural, and thus permit the establishment of banks in as many places within the county, city or town as the judgment of the directors may prompt. Such a construction finds no resting place in reason. If followed it would, instead of centralizing and rendering more stable the powers of a bank enable it, by multiplying its place of business, to subdivide and at the same time extend its powers in such manner as to stifle competition. . . . " (Words in parenthesis ours.)

The memoranda of the result of the examinations by the Examiners of the Federal Deposit Insurance Corporation reveals that some notes are taken by the safe deposit corporation at Kansas City, made payable directly to the bank, and in other instances, notes upon loans taken by the safe deposit corporation are turned over to the bank without the endorsement of the safe deposit corporation. The contract between the bank and the safe deposit corporation and the individuals who are named as its agents, gives the right to both the bank and the safe deposit corporation to discount notes, and especially gives the bank the right to discount notes made payable to the safe deposit corporation. These are all, we think, acts carrying on the business of banking. "Banking" is defined in 9 C.J.S., page 30, Section 1, as follows:

"Banking is the business or employment of a bank or banker, and as defined by law and custom consists of receiving deposits payable on demand, discounting commercial paper, making loans of money on collateral security, issuing notes payable on demand and intended to circulate as money, collecting notes or drafts deposited, buying and selling bills of exchange, negotiating loans, and dealing in negotiable securities issued by the national or state government, or by municipal or other corporations. It is said, however, that any person engaged in the business carried on by banks of deposit, of discount, or of circulation is doing a banking business, although but one of these functions is exercised. * * * ."

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These acts, whether performed by the safe deposit corporation as the agent of the bank, or by the bank itself, at Kansas City, Missouri, would constitute branch banking. It is true that there are two corporations, the bank and the safe deposit corporation, Kansas City, Missouri. The bank itself in the beginning carried on in its own banking house the safe deposit business, purchased by the safe deposit corporation and since operated by the safe deposit corporation upon its incorporation. The bank sold this business, or pretended to sell it, to the safe deposit corporation. The majority stockholders of the bank became the majority stockholders of the safe deposit corporation upon its said incorporation. The directors of the bank became the directors of the safe deposit corporation. This means that the stockholders in both corporations and the directorate of both corporations were identical. The safe deposit corporation, according to the memo of the examiner, in October, 1949, owed the bank \$49,000.00. When a loan is negotiated by the safe deposit corporation it pays to the borrower the amount of his loan by check on the account of the safe deposit corporation to the bank. It would appear to be conclusive, we think, that should the safe deposit corporation suffer a loss from the non-payment of any note held by it or taken by it and held by the bank, involving the depletion of its account in the bank, such losses would likewise be the losses of the bank. It appears that the bank shared in a part, if not all, of the profits of the safe deposit corporation, and that all or nearly all the acts of business carried on at Kansas City, Missouri, were incidents of banking and acts that the bank is chartered under said Section 7949 to do, and which it must do under the statutes in its banking house. These facts and conditions surrounding these two corporations and identified with the acts of both in carrying on the business of lending money, discounting notes and servicing loans made by the safe deposit corporation in Jackson County, Missouri, demonstrate that the bank is the dominant power, if not the entire power, in carrying on such business. The community of interest between both corporations in the business carried on in Kansas City, Missouri, reflecting as they do that the safe deposit corporation took its initial business by purchase from the bank and continues its present corporate existence, for the purpose of negotiating the loans herein discussed, because of the favors and credit granted it by the bank, which has the power to deny further credit to the safe deposit corporation and has the further power to cast upon the safe deposit corporation the onus of the liability for losses

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growing out of any of the notes negotiated by the safe deposit corporation and owned by the bank whether delinquent or not, as is provided in their said contract, and the ownership of the majority stock in the safe deposit corporation being the majority ownership of stock in the bank, all indicate that the bank has been at all times, and now is in control of and carrying on, through the safe deposit corporation, merely as its pretended agent, branch banking away from and outside of its home banking house. It is an often-expressed and well-established rule of law that whoever, whether a corporation or individuals, owns a majority of the shares of the capital stock of another corporation, controls it. (State ex inf. vs. Standard Oil Co., 218 Mo. 1, 1.c. 327, citing and quoting People ex rel. v. Chicago Gas Trust Co., 130 Ill., 1.c. 292).

39 C.J. 35, Section 4, defines the relationship of master and servant as follows:

"The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done. * * * ."

We believe that the facts here indicate that there are not two independent corporations capable of contracting and dealing each with the other at arms length, each having and exercising its own will in their contractual relationship in carrying on this business, but that the relationship of master and servant existed and still exists between these two named corporations, the bank being the master and in control of this business, and that the safe deposit corporation is the servant, subject in most, if not all, of its acts to the will of the bank in the business being carried on at Kansas City, Missouri. This is branch banking by the bank.

CONCLUSION.

It is, therefore, the opinion of this Department that, considering the above recited proceedings, described in the reports of the examinations of the affairs of the bank in question by the Federal Deposit Insurance Corporation, and

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transmitted by you to this Department, such as taking notes from borrowers of money from the agent-corporation, payable to the bank, taking notes for loans payable to the agent-corporation and delivered to the bank without endorsement by the agent-corporation, and the servicing of all notes which are negotiated by the agent-corporation, whether payable directly to the bank or to the agent-corporation and then transferred to the bank, being carried on by the safe deposit corporation, the agent-corporation, for the said bank at Kansas City, Missouri, a city other than the home city of the bank, and in consideration of the above cited and quoted authorities, such proceedings constitute branch banking.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir 

TRAINING SCHOOL: Boy sentenced to twenty years in 1944
BOARD OF TRAINING SCHOOL: and committed to training school where
he was paroled is still under juris-
diction of training school upon
reaching twenty-one years of age.

June 29, 1950

7-12-50

Honorable W. E. Sears
Director, Board of Training Schools
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"On March 20, 1944, a boy was sentenced in the Circuit Court of Cass County, to serve twenty (20) years in the Missouri State Penitentiary on a charge of Second Degree murder. Due to the fact that the boy was a minor, fourteen years of age, the sentence was commuted to the Missouri Training School for Boys at Boonville, Missouri.

"The commitment accompanying the boy, points out that certain procedure should be followed. The circumstances of this procedure is outlined in the following notation taken from the official commitment:

"The superintendent of said training school is required to receive and safely keep, the said defendant, in the training school aforesaid, until the said defendant becomes of age, at which time it is ordered that he then be committed to the penitentiary of the State of Missouri, there to be kept, confined, and treated in the manner directed by law, until the sentence of this Court be complied with, or until the said defendant shall be otherwise discharged by due course of law."

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"On or about September 12, 1946, an opinion was issued from your office in answer to a question as to whether or not the boy could be placed on parole. The conclusion as given in the opinion is as follows:

"Therefore, it is the opinion of this department that a boy confined in the Missouri Training School for Boys at Boonville, Missouri, who has met the requirements of the institution for parole, is entitled to be considered for the same even though his sentence may be for such a term that he could be confined in the State Penitentiary."

"Due to the fact that the boy has been on parole and possesses an excellent record under the supervision of the Training School Board since July 30, 1947, and knowledge that the twenty-first birthday of the boy will be realized on June 16, 1950, your assistance is respectfully solicited with regard to the following problems:

"1. Is the boy in question entitled to discharge at the time he reaches the age of twenty-one or is the Board required to turn over the custody of the boy to officials of the Missouri State Penitentiary?

"2. May the Board of Probation and Parole, who supervises adults, if they see fit to do so, parole the boy and accept supervisory responsibility without the boy being delivered into actual custody and confinement?"

It will be noted from your request that the boy in question was sentenced in 1944, and the place of confinement and the extent of his punishment are governed by the law then in effect.

There is no doubt that in this state a child under the age of seventeen years may be prosecuted under the general laws (Section 9700, R.S. Mo. 1939; State ex rel. Wells v. Walker, 326 Mo. 1233, 34 S.W. (2d) 124).

The request further shows that the person in question was convicted of second degree murder and was sentenced to twenty years in the Missouri State Penitentiary. Such a sentence was

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proper because under Section 4378, R.S. Mo. 1939, second degree murder is punished by imprisonment in the penitentiary for not less than ten years.

Section 8998, R.S. Mo. 1939, which was in effect when the person in question was sentenced, provides, in part, as follows:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri Training School for Boys; * * *"

From the above it will be seen that the circuit judge before whom the trial was had, upon a verdict being returned finding the defendant guilty of murder in the second degree, had the discretion either to sentence the defendant to the penitentiary or to commit him to the Missouri Training School for Boys. A reading of the commitment set forth in the request discloses that the defendant was committed to the training school until he "becomes of age," at which time he was to be committed to the penitentiary.

We find no cases in the state dealing with the validity of such a commitment. However, in the case of *Ex parte Grabinski*, 213 Mich. 108, 181 N.W. 704, the Supreme Court of Michigan had before it the validity of commitment of sixty days' confinement to the county jail, at the expiration of which the defendant was to be confined in the Michigan Reformatory for six months. The statute under which he was sentenced provided that the punishment should be "imprisonment in the State Prison, Michigan Reformatory, or the Detroit House of Correction, for a period of not less than six months nor more than one year, or by imprisonment in the county jail for not less than thirty days, nor more than one year, or by both fine and imprisonment in the discretion of the court." At N.W. l.c. 705, the court said:

"The amendment made at the extra session of the Legislature in 1919 was intended to vest a discretion in the court and permit sentence to a penal institution or the county jail, but not to both. When the circuit judge

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sentenced petitioner to the county jail, he exercised the discretion reposed in him by law to consider the case as one demanding imprisonment as for a misdemeanor rather than a felony, and he could not make the sentence, one part as for a misdemeanor and another part as for a felony. * * *

The court further said at l.c. 706:

"When a prisoner is sentenced to a designated prison, and is there confined under sentence, power of the court has been exercised and is exhausted so far as place of confinement is concerned. There is no statute or precedent so far as we can find allowing the court to sentence a prisoner to imprisonment in a designated jail or prison for a part of the punishment and to another jail or prison for another part. We must hold that the circuit court had a right to sentence petitioner to imprisonment in the county jail and there imprison him in default of the payment of the fine imposed, but not to sentence him to the county jail for imprisonment and from there to the Michigan Reformatory for imprisonment in default of the payment of the fine. Sentence must not be imposed to be served piecemeal, a part thereof in a county jail and another part in a penal institution. * * *

Therefore, it would appear that the Circuit Court of Cass County in exercising its discretion under the statute, by committing the defendant to the training school, exhausted its power as to designating the place of confinement, and such commitment should read as if defendant were committed to the training school for boys.

The question which then arises, as presented in your request, is what disposition must be made by the Board of Training Schools of the boy when he reaches his twenty-first birthday.

A review of the history of the statutes prior to the Constitution of 1945 and the new Board of Training School Act (Laws of Missouri, 1947, Vol. II, page 320) reveals no intention on the part of the Legislature to restrict the confinement in the Missouri Training School for Boys to persons under the age of twenty years. Section 22 of the Laws of Missouri, 1917, page 155, provided that a person under the age of eighteen years

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who was convicted of a crime, punishment of which was death or imprisonment in the penitentiary for a term of not less than ten years, could be committed to the Missouri Reformatory for a term of not less than five years. Such sentence could expire after the twenty-first birthday of the inmate. Said section also provided that the sentence of any male person between the ages of eighteen and thirty years could be commuted to confinement in the Missouri Reformatory. Section 23 of said law provided that the Governor could commute the punishment of any person under the age of thirty years who was confined in the penitentiary to commitment in the reformatory. The 1917 law remained in effect until 1927 when the age for commutation was reduced to twenty-one years (Laws of 1927, page 379).

Furthermore, Section 9673, R.S. Mo. 1939, which is still in effect and which deals with children under the age of seventeen years tried by the juvenile court as delinquents, provides that:

" * * * nothing in this article shall prevent the juvenile court from inflicting a punishment which shall extend beyond the age of majority in cases where the delinquent shall be convicted of a crime, the punishment of which under the statutes of this state, when committed by persons over the age of eighteen years, is death or imprisonment in the penitentiary for a term of not less than ten years.
* * *"

Under the above section a juvenile who is found by the court to be a delinquent child because he has committed a certain type of crime may be committed to the training school for a term which will expire after he reaches his majority.

In view of the above statutes, we believe that a person who under seventeen years of age was convicted of second degree murder in 1944 and sentenced to twenty years in the penitentiary could be committed by the judge to the Missouri Training School for Boys, and the custody of such boy by the training school did not expire when the boy reached the age of twenty-one and the boy remained subject to the jurisdiction of the officials of the training school. In view of the fact that a person who has been paroled is still in constructive custody, then such custody remains in the Board of Training Schools until his sentence expires or he is sooner discharged by due course of law.

In view of the above conclusion an answer to your second question is unnecessary.

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CONCLUSION

It is, therefore, the opinion of this department that a boy under the age of seventeen years who in 1944 was convicted and sentenced to twenty years in the penitentiary and was committed by the court to the Missouri Training School for Boys remains subject to the control and jurisdiction of the Board of Training Schools until the expiration of his term or until otherwise discharged by due course of law, and said boy upon reaching his twenty-first birthday should not be transferred to the Missouri State Penitentiary.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

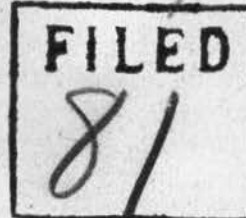

J. E. TAYLOR
Attorney General

AMO'K:ml

item
COUNTY COURT: County court has authority to transfer moneys
from one ~~budget~~ to another in Class 4 if found
COUNTY BUDGET: necessary and beneficial.

July 6, 1950

Honorable J. F. Selby
Judge of the Probate Court
Harrison County
Bethany, Missouri



Dear Judge Selby:

This is in reply to your request for an opinion which
is as follows:

"I would like to have your opinion as to
the transfer of our book and office supply
budget to our salary budget here in
Harrison County.

"Since we are in badly need of a Probate
Clerk and the County Court only appropri-
ated \$750.00 for extra help here in the
office. We have ample money in our office
supply budget to finish the year for books,
etc, and also our extra salary for a
Probate Clerk.

"We have been informed that the Court may
transfer money from one budget to another
if necessary."

A cardinal rule of construction is that in construing a
statute its object and purpose must be kept in mind and such
construction placed upon it as will, if possible, effect its
purpose. White v. Greenlee, 85 S.W. (2d) 112, 337 Mo. 514.

The courts of Missouri have declared the purpose to be
accomplished by the enactment of the County Budget Law in
many cases. In the case of State ex rel. Armontrout v. Smith,
182 S.W. (2d) 571, the court stated at l.c. 574:

" * * * All of these acts, the Budget Act,
the Purchasing Agent Act and the County
Budget Act, were passed at the same ses-
sion in 1933. Their primary purpose was
to regulate the usual operation of the
regular departments of Government whose
needs could be foreseen and planned on a
biennial basis. * * * "

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In the case of Bradford v. Phelps County, 210 S.W. (2d) 996, the court said at l.c. 999:

"It has been written a county court is only the agent of the county with no powers except those granted and limited by law and, like other agents, it must pursue its authority and act within the scope of its powers. Wolcott v. Lawrence County, 26 Mo. 272; State ex rel. Quincy, M. & P. R. Co. v. Harris, 96 Mo. 29, 8 S.W. 794; Jensen v. Wilson Tp., Gentry County., 346 Mo. 1199, 145 S.W.2d 372, 373; and now see again State ex rel. Kowats v. Arnold, supra, and Section 7, Article VI, Constitution of 1945. County courts as the managerial agents of the county have the duty to so manage the county's fiscal affairs as to comply with Section 26, Article VI, Constitution of Missouri, 1945, providing (inter alia) limitations on indebtedness of local governments. Section 10910 as amended, Laws of Missouri, 1945, pp. 610, 611, of County Budget Law, supra, Mo. R.S.A. § 10910. The County Budget Law makes it more expedient for the county court to perform its duty, that is, the County Budget Law provides 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W.2d 340, 342. * * * "

And in the case of Gill v. Buchanan County, 142 S.W. (2d) 665, the court declared at l.c. 668:

" * * * This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W. 2d 340, 342."

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Your question, simply stated, is whether or not the county court may at this date transfer money from one budget of a department to another budget of the same department within a class.

Section 10911, R. S. Mo. 1939, provides:

"The court shall classify proposed expenditures in the following order:

* * * * *

"Class 4. The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

And Section 10914, R. S. Mo. 1939, is in part as follows:

"The court shall show the estimated expenditures for the year by classes as follows:

* * * * *

"Class 4. Pay or salaries of officers and office expense. List each office separately and the deputy hire separately."

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We have already seen above that the purpose of the County Budget Law is to put the counties on a cash basis. In order to do this the county courts must estimate the expenditures for the year in advance. There are certain restrictions upon the transfer of funds from one class to another; however, we are unable to find any statutory restriction upon the transfer of funds within a class. While it is true that the county court is directed to prepare the budget at its regular February term, nevertheless, there does not appear to be any statutory limitation upon subsequent revision within the classes. The general rule concerning the powers of county courts to reconsider or rescind its orders is set out in 20 Corpus Juris Secundum at page 872, 873:

"Where a county board or court exercises functions which are legislative, administrative or ministerial in their nature and which pertain to the ordinary county business, see §§ 81-84, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action, provided rights in third persons have not become vested thereunder; * * * * "

* * * * *

"A county board or court may at the term or session at which an order is made, revise or rescind it, provided this is done before any rights accrue thereunder. Ordinarily it has no power to do such act subsequent to such term or session, although there is authority to the effect that this rule is limited to judicial acts and is not applicable to legislative and ministerial acts."

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The action of the county court in preparing the classification of expenditures under the provisions of the County Budget Law has been held to be legislative in character. (Bash v. Truman, 75 S.W. (2d) 840, 843.)

In two Kentucky cases a similar question as to the right of reconsideration and revision of an order by a county court has been decided. In the case of Crick v. Rash, 229 S.W. 63, the court said at l.c. 65:

"Under ground (2) relied on in the petition in support of the injunction, the principal objection is that the fiscal court changed its orders a number of times after the entry of a prior one and after the adjournment of the court, which orders related to various administrative matters pertaining to the sale of the bonds, such as the appointment of commissioners for the handling of the proceeds, the roads upon which such proceeds or portions thereof should be expended, and other matters of similar nature. It is insisted that the fiscal court, being one of record, had no jurisdiction to change any of such orders after they had been made and after the term of court at which they were made was adjourned. But a sufficient answer to all this is that in the cases of Commonwealth v. Beauchamp, 136 Ky. 227, 124 S. W. 284, Crittenden County Court v. Shanks, 88 Ky. 475, 11 S.W. 468, 11 Ky. Law Rep. 8, and Scott v. Forrest, 174 Ky. 672, 192 S.W. 691, we held that the orders of the fiscal court as are here involved were legislative in their nature rather than judicial, and that they were subject to be revoked, modified, or altered at a subsequent term of the court, provided such modification, alteration, or renunciation did not affect previously acquired rights of any one who acted upon the faith of their original entry."

And again in the case of Sandy Hook Bank's Trustee v. Elliott Co. Fiscal Court, 58 S.W. (2d) 637, the court reiterated the above principle at l.c. 638:

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"The fiscal court is an executive as well as a judicial body. When it acts judicially its judgments may not be set aside at a subsequent term, except upon the grounds on which judgments of other courts may be set aside. But when it acts in its executive capacity its orders stand just as the orders of any other executive body. To illustrate, if the directors of a bank or a city council had made an order similar to that of October 9, clearly they could at a subsequent meeting set it aside. There was no consideration for it. It was simply a voluntary action on the part of the court, taken under its power to 'regulate and control the fiscal affairs and property of the county.' Ky. Stats. § 1840. Black's Law Dictionary, p. 461."

It is the duty of the county courts to see that the business of the county is transacted in an expeditious manner and one designed to secure the best services possible for the residents with the available money. Certain statutory restrictions have been placed upon the county court, but we do not find any which would not permit the transfer of moneys within a classification from one budget to another if the county court subsequently found that such transfer would promote the best interests of the people.

However, we believe that in the event of any such revision the applicable provisions of Section 10917, R. S. Mo. 1939, should be followed. That section reads:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record

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of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail. The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand.) If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.


"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

CONCLUSION

Therefore, it is the opinion of this department that the county court may transfer money from one item to another in Class 4 if such transfer is found to be necessary and beneficial to the county.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

JOHN R. BATY
Assistant Attorney General

BANKS:

Commissioner of Division of Finance not authorized to issue license to mutual savings bank organized in the state of New York to conduct its business in this state.

July 31, 1950

Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri



Dear Mr. Shaffner:

The following opinion is rendered in reply to your inquiry reading as follows:

"A savings bank organized and chartered in the State of New York proposes to buy G. I. and other Federally guaranteed loans in this State and to secure a person or firm in this State to service those loans.

"In buying and servicing those loans, they desire to have their action approved and are of the opinion that this Division is the one to issue such permit. In this connection they maintain Sections 7893 and 7992, Banking Laws, Missouri, 1939, would apply.

"May I be favored with an opinion which will state whether or not this Division has any responsibility and to what extent?

"For your information there is attached a statement showing corporate structure of such a savings bank."

Facts appearing in your request for an opinion disclose that a mutual savings bank organized and operating under the laws of the state of New York seeks to obtain a license from the Division of Finance permitting it to conduct a portion of its mortgage loan business in Missouri through an appointed resident agent in this state.

Honorable H. G. Shaffner

Prior to the establishment of the state banking department as a separate administrative department of government in Missouri in 1907 (Laws of Missouri, 1907, page 124), Section 1025, R. S. Missouri, 1899, as amended in 1903 (Laws of Missouri, 1903, page 123) included the following provision: "* * * No corporation organized under the laws of a foreign state shall be licensed to engage in the banking business in any manner in this state."

The above-quoted portion of Section 1025, R. S. Missouri, 1899, as amended in 1903, has been brought forward through the intervening years in each revision of our state statutes and was included in the 1939 revision at Section 5074 of Article I, Chapter 33, R. S. Missouri, 1939, said article containing the general provisions of our laws relating to corporations. This particular prohibition has remained as a part of the corporation code of this state since 1903, and it has been changed, in its form only, as late as 1943 when this state adopted the General and Business Corporation Act of 1943 (Laws of Missouri, 1943, page 410.) For the purpose of this opinion it is not necessary to discuss the prohibition in its present form as directed to the Secretary of State as he administers the General and Business Corporation Act of 1943.

Section 7949, Article 2, Chapter 39, R. S. Missouri, 1939, has been a part of the code applicable to banks in this state since its enactment in 1915 (Laws of Missouri, 1915, page 113). So much of the section as is germane to the present inquiry reads as follows:

"Every corporation shall be authorized and empowered:

"1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and non-negotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest: Provided, however, that no bank shall maintain in this state a branch bank, or receive deposits or pay checks except in its own banking house." (Underscoring ours.)

Honorable H. G. Shaffner

The prohibition contained in Section 7949, supra, against establishing branch banks in Missouri was reviewed by the Supreme Court of Missouri in 1923 in the case of State ex rel. Barrett v. First National Bank, 297 Mo. 397, wherein the attorney general of this state successfully resisted the efforts of a national bank to establish branches in this state. In the course of the opinion the court spoke as follows at 297 Mo. 1. c. 413:

"V. In this State the banking business can be conducted only by a corporation. Thus organized, the extent of its powers must, as we have said, be determined by the statute of its creation. The state banking act gives express recognition to this rule in providing that banks, whether incorporated under Federal or State law, can transact only such business as is permitted by the laws of the United States or of the State. (Sec. 11684, R. S. 1919.) Branch banks, not having been permitted by the state law either by express terms or necessary implication, the well recognized canon of construction will authorize the exclusion of this power from those granted. Reliance upon this rule is, however, unnecessary in the presence of a subsequent section (Sec. 11737, R. S. 1919) in which it is provided 'that no bank shall maintain in this State a branch bank or receive deposits or pay checks except in its own banking house.' The attempt, therefore, of the respondent to establish a branch bank is not only an act in excess of its corporate powers, but in violation of an express statute."

Considering that during a period covering forty-seven years no foreign banking corporation has been licensed to conduct its business in the State of Missouri, we conclude that the long-continued interpretation of Section 5074 and Section 7949, R. S. Missouri, 1939, as quoted supra, is in itself justification for denying a license to the mutual savings bank which has its corporate domicile in the state of New York. However, we need not rest our conclusion on this fact alone. Under the banking laws of Missouri it is mandatory that all banks and trust companies have a capital stock structure. A New York mutual savings bank operates without capital stock structure, and it is readily apparent that if it were licensed to do business in this state it would be unable to comply with the express provision of Section 7992, R. S. Missouri, 1939, with respect to stating in its application for a license "the amount of its capital actually paid in cash and the amount subscribed for and unpaid." We deem it necessary to set forth additional reasons for the conclusion hereinafter stated.

Honorable H. G. Shaffner

CONCLUSION

It is the opinion of this department that the Commissioner of the Division of Finance is not authorized under the banking laws of Missouri to issue a license to a mutual savings bank organized under the laws of the state of New York to conduct its business in Missouri.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

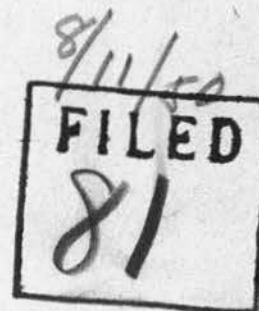
BANKS

TRUST COMPANIES

-) A trust company operating under Article 3, Chapter 39,
-) R. S. Mo., 1939, may qualify as executor of an estate.
-) Such trust company not required to make deposit of
-) securities with Commissioner of Finance under Section
-) 8068, Article 3, Chapter 39, R. S. Missouri, 1939,
-) if it elects to qualify as such executor by giving
-) bond as required by law for appointment of individuals
-) as executors.

August 3, 1950

Honorable H. G. Shaffner, Commissioner
Division of Finance
Department of Business and Administration
Jefferson City, Missouri



Dear Mr. Shaffner:

The following opinion is rendered in reply to
your recent request which reads as follows:

"Under date of May 16 a request was
made for an opinion regarding operations
in which the Guaranty Trust Company of
Missouri, Clayton, Missouri was interested.

"In this connection there are attached
the original Articles of Agreement of the
trust company referred to. It is asked
that an opinion be rendered on the basis
of whether or not the trust company may
serve as a corporate executor in a small
estate, also do the Statutes provide a
trust company must deposit bonds in the
amount of \$200,000 with this Division in
order to qualify with a Probate Court."

The Guaranty Trust Company of Missouri is a
corporation formed under the provisions of Article 3,
Chapter 39, Revised Statutes of Missouri 1939, said
article being entitled "Trust Companies." Powers and
purposes of corporations organized under the aforesaid
article are set forth in Section 8024, R. S. Mo. 1939, as
repealed and reenacted by House Bill 2086, passed by the
65th General Assembly. Among the several powers granted
in said section we find the following:

Honorable H. G. Shaffner

"To act as executor and trustee under last will, or as administrator with or without the will annexed, of the estate of any deceased person, or as guardian or curator of any infant, insane person, idiot or habitual drunkard, or trustee for any convict in the penitentiary, under the appointment of any court of record having jurisdiction of the person or estate of such deceased person, infant, insane person, idiot, habitual drunkard or convict."

In taking unto itself the powers enumerated from Section 8024, as quoted above, the Guaranty Trust Company of Missouri incorporated the quoted provision in its Articles of Agreement, and shown at paragraph seven thereof. The quoted portion of Section 8024, supra, clearly disposes of the first question posed in the opinion request. The statute definitely conveys a power to the trust company to act as executor.

The second question presented in the opinion request calls for a ruling as to whether a trust company may qualify as executor in the probate court without first having deposited securities in the amount of two hundred thousand dollars with the Commissioner of the Division of Finance. Section 8068, Article 3, Chapter 39, R. S. Mo. 1939, provides, in part, as follows:

"Any company now doing business in this state or which may hereafter be organized under the provisions of this article to do business in this state, which shall make with the finance commissioner a deposit of two hundred thousand dollars, * * * * *, and which shall satisfy said commissioner of its solvency, and shall have received the certificate of said commissioner that such company has made said deposit and has satisfied

Honorable H. G. Shaffner

him of its solvency, it being hereby made the duty of said commissioner to issue such certificate in accordance with the facts, shall be permitted to qualify as guardian, curator, executor, administrator, assignee, receiver, trustee, or in any other fiduciary capacity, by appointment of any court, or under will, or depository of money in court, without giving bond as such, and become sole guarantor or surety in or upon any bond required by law to be given in any proceeding in law or equity in any of the courts of this state or other states or of the United States, any other statute to the contrary notwithstanding; and whenever such company shall exhibit to the court, judge, clerk or other officer, making such appointment, or whose duty it is to approve such bond, the certificate of the finance commissioner of the state of Missouri that such company has complied with the provisions of this section with respect to said deposit and proof of solvency, the court, or officer making such appointment, or whose duty it is to approve such bond, may appoint such company to such office or trust, and permit it to qualify as such without giving any bond, and permit such company to become sole guarantor or surety upon such bond, without requiring any other surety therefor. The fund so deposited with the commissioner shall be primarily liable for the obligations of such company as guardian, curator, executor, administrator, assignee, receiver, trustee or any other fiduciary capacity,

Honorable H. G. Shaffner

by appointment of a court or under will, depository of money in court, guarantor or surety in or upon any such bond, and shall not be liable for any other debt or obligation of the company until all trust liabilities as aforesaid of such company have been discharged; * * * Provided, that any person doing the business specified in this section, shall enjoy the privileges conferred by this section by complying with the provisions thereof: Provided, that before any company shall be permitted to comply with the provisions of this section, such company shall have at the time of making said deposit, in addition to said deposit of two hundred thousand dollars a paid up capital of at least fifty thousand dollars, if located in a city of less than 10,000 population; one hundred thousand, if located in a city of 10,000 population or over and less than 50,000; two hundred thousand dollars, if located in a city of 50,000 population or over." (Emphasis ours.)

Section 8068, supra, clearly discloses that a trust company may qualify to serve as an executor or administrator under the order of a probate court without giving bond as such executor or administrator only when full compliance is had with the provisions of this statute. The statute does not contain a mandatory provision directing that trust companies desiring to act as executors or administrators place the deposit of securities with the Commissioner of the Division of Finance. The deposit is to be made in the event the trust company desires to act as executor or administrator without giving bond.

Honorable H. G. Shaffner

CONCLUSION

It is the opinion of this office that (1) a trust company operating pursuant to the provisions of Article 3, Chapter 39, R. S. Mo. 1939, may serve as executor of an estate, and (2) that such trust company is not obligated, under Section 8068, Article 3, Chapter 39, R. S. Mo. 1939, to make a deposit of securities with the Commissioner of the Division of Finance before it qualifies to serve as an executor if it is willing to give bond in the manner now provided by law for appointment of individuals as executors.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

JLO'M:hs

BANK HOLIDAYS:

Bank holidays may be fixed by banking institutions in Missouri or changed after being fixed by the adoption at least 15 days in advance thereof, of a resolution to such effect by a majority vote of the Board of Directors thereof and posting notice thereof in the bank or trust company for the same time. Holiday must be on a certain day of each week of the year.

September 18, 1950



Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will supply the opinion you requested in your recent letter respecting the selection and adoption of a weekly bank holiday by banking institutions in Missouri. Your letter follows:

"In connection with Section 3100, R. S. Missouri, 1939, as amended by Laws of Missouri 1947, Volume I, page 221 and the Bank Holiday Statute as found at page 310 of the same volume, will you please provide me with your opinion on the following:

"1. May a bank which has not taken any action under these statutes to close on any particular day, close on one day such as Wednesday, August 16? This question assumes that the Board of Directors of the bank adopts an appropriate resolution and that the notice required by the statutes is posted the requisite period in advance.

"2. May a bank which has taken appropriate action under these statutes so as to be closed on each Friday (or Saturday or any other day of the week as the case may be) discontinue this closing and close on one day such as Wednesday, August 16 and thereafter resume closing on the same day of each week, say each Friday or each Tuesday as the case may be? This question

Honorable H. G. Shaffner

assumes that the Board of Directors of the bank adopts appropriate resolutions and that the notice required by the statutes is posted for the requisite period in advance."

The new bank holiday statute, Laws of Missouri, 1947, Volume I, page 310, upon the provisions of which our opinion is requested, reads as follows:

"Any bank or trust company organized under the laws of the State of Missouri, or any national bank doing business in Missouri, may remain closed on any Sunday or public holiday, as defined in Section 15310 of the Revised Statutes of Missouri, 1939, and, in addition, on any day of the week fixed at least fifteen days in advance by the adoption of a resolution to such effect by a majority vote of the Board of Directors thereof, and notice thereof posted in the bank or trust company for the same time. Any day on which such bank or trust company organized under the laws of the State of Missouri or national bank doing business in Missouri shall, pursuant to such vote and notice, remain closed, shall, with respect to such bank or trust company or national bank, be deemed a holiday for the purposes of Chapter 14 of the Revised Statutes of Missouri, 1939, and amendments thereto, and no such bank or trust company or national bank shall be required to permit access to its safe deposit vaults on such day. Where a contract by its terms requires the payment of money or the performance of a condition on any such day by or at such bank or trust company or national bank, such payment may be made or condition performed on the next business day succeeding such day when such bank, trust company or national bank shall so remain closed, with the same force and effect as if made or performed in accordance with the terms of the contract."

This statute was enacted by the Legislature in aid and support of and is an extension of the provisions of Section 3100 of Article 1, Chapter 14, R. S. Mo. 1939, as amended, Laws of Missouri, 1947, pages 221, 222, relating to bills and notes, under

Honorable H. G. Shaffner

our negotiable instruments statutes, as the certification and acceptance of such instruments are to be affected by holidays, Said Section 311, as amended, Laws of Missouri, 1947, pages 221 and 222, reads as follows:

"Every negotiable instrument is payable at the time fixed therein, without grace. When the day of maturity falls upon a Sunday, Saturday or holiday, or on any day on which the office at which the negotiable instrument is payable, is closed by law or custom of such office, evidenced by a notice posted in said office for at least 15 days, the instrument is payable on the next succeeding business day, except that the payment, certification or acceptance of any check or other negotiable instrument or any other transaction by any bank, trust company or other person in this State at any time on Saturday or on any day on which the office of the particular bank, trust company or other person is closed by its custom (evidenced as aforesaid) if said payment, certification or acceptance or other transaction would otherwise be valid, shall be valid and binding upon all parties. No office which by its custom (evidenced as aforesaid) closes on any particular day or at a fixed hour on any particular day, shall be required to remain open on that day or after that hour for the transaction of business or to pay or accept payment of any check, note or other negotiable instrument or perform any other transaction."

We shall keep in mind and have before us also in the construction of the bank holiday statute the two related sections, Section 3161, Article 2, Chapter 14, Laws of Missouri, 1947, page 222, and Section 3212, Article 5, Chapter 15, R. S. Mo. 1939. These two sections read, respectively, as follows:

"A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of Section 3087 and 3100 of this chapter."

"Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day."

Honorable H. G. Shaffner

Your letter, in two paragraphs, should be answered in like manner, we believe, first giving attention to paragraph 1.

The intention of the Legislature in the enactment of said statute was and is, we believe, that the selection and fixing of any bank holiday upon which a bank may remain closed, in addition to Sundays and public holidays as defined in Section 15310, Chapter 131, R. S. Mo. 1939, must be on a definite day of each week in each month of the calendar year.

The statute is express in its terms providing the method for fixing a bank holiday. The section reads: "Any bank or trust company organized under the laws of the State of Missouri, or any national bank doing business in Missouri may remain closed * * * * on any day of the week fixed at least fifteen days in advance by the adoption of a resolution to such effect by a majority vote of the board of directors thereof, and notice thereof posted in the bank or trust company for the same time." Where a statute directs the performance of certain things in a particular manner, or by a particular person, it implies that it shall not be done otherwise nor by a different person (59 C.J. 984; State ex rel. v. Holtcamp, 322 Mo. 258).

The purpose of this statute is, it would reasonably appear, to provide a method for establishing a holiday by banks and trust companies for the benefit of the personnel of an institution doing a banking business in this State and to serve a public purpose as well, so that if and when such a holiday is fixed by such institution, it must be after the interested public is notified thereof and of a definite day of the week therefor, fixed as provided for in this statute.

We believe that said section means, and the Legislature intended it should mean, that if a bank or trust company doing business in Missouri desires to establish a holiday, it must be upon a definite day--any day, except Sunday--of each week, so that the holiday will be a weekly holiday, fixed at least fifteen days in advance of the adoption by a majority vote of the Board of Directors of such bank, a resolution fixing such holiday, and the posting of a notice in such bank or trust company for fifteen days that the bank or trust company has fixed such holiday on such day of the week. This is our view and conclusion on the question submitted in paragraph 1 of your letter.

As we read and understand paragraph 2 of your letter, it assumes a theoretical case where an institution doing banking business in this State has fixed a definite weekly holiday, taking as an example Friday of a week, or any other day of a week, in obedience to the terms of the said bank holiday statute. Then it submits the question, could such institution, so having selected

Honorable H. G. Shaffner

such weekly holiday, discontinue the closing of the institution on that day of the week, and select as a holiday and close on another day of the week, and, so having changed the first selected holiday to a secondly selected day of the week for such holiday, then may the holiday selected as a second choice be abandoned by the institution, and may it resume closing on the first selected holiday in the given example?

The change from a day already fixed by a banking institution as a weekly holiday to a secondly fixed weekly holiday, and, thereafter, a change back to the first fixed weekly holiday could not lawfully be accomplished, we believe, unless and until at least fifteen days in advance thereof a resolution of the Board of Directors of the institution was passed so selecting such holiday and notice thereof for the same time, before any and all changes thereof, be posted in the banking institution, all as required by the statute.

CONCLUSION

It is, therefore, the opinion of this Department that:

1) Any institution, authorized to do banking business in Missouri, including trust companies and national banks, which has not taken any action under our present bank holiday statute, Laws of Missouri, 1947, page 310, may fix as a bank holiday and remain closed on that day of the week, any day of the week except Sundays, fixed at least fifteen days in advance, by the adoption of a resolution to such effect by a majority vote of the Board of Directors thereof, and by posting notice thereof in the bank or trust company or national bank for the same time.

2) That where an institution doing banking business in Missouri has previously taken action and fixed a weekly bank holiday, under the provisions of our present bank holiday statute, Laws of Missouri, 1947, page 310, desires to change its weekly holiday it may select any other day of the week as such holiday and discontinue the closing on the day of the week first selected, and close as and for such holiday on the secondly selected day, and may thereafter, if it so desires, abandon the secondly selected day of the week as a holiday and change back to the first weekly holiday so fixed, by complying with the requirements of the statute.

APPROVED:

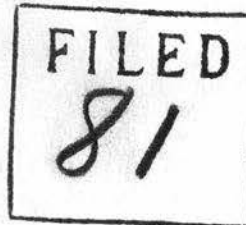
Respectfully submitted,

J. E. TAYLOR
Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

FINANCE) No statutory authority exists authorizing Commissioner
RECORDS) of the Division of Finance to dispose of records required
to be maintained by Section 7884, R. S. Missouri, 1939,
as amended, except as provided in House Substitute for
House Bill No. 626, Laws of Missouri, 1945, page 1427.

October 30, 1950



11-8-50

Honorable H. G. Shaffner
Commissioner, Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in compliance with
your recent request reading as follows:

"Our storage vault has become over-
taxed with many years of records
pertaining to state chartered banks
and trust companies.

"May we be favored with an opinion
regarding the length of time such
records should be preserved?"

Section 7884, R. S. Missouri, 1939, as re-enacted by
the Sixty-fifth General Assembly in House Bill (Revision) No.
2084 provides as follows:

"The Commissioners of Finance shall
preserve all records, reports and
papers pertaining to the Division of
Finance, and shall make a report in
writing to the Governor whenever required
by the Governor."

The general rule governing the care and custody of public
records is stated in 45 Am. Jur., Records and Recording Laws,
Section 12, as follows:

"Public records and documents are the
property of the state and not of the

Honorable H. G. Shaffner

individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain and can be removed only under authority of an act of the Legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made."

In 1945 the Sixty-third General Assembly of Missouri passed an act, Laws of Missouri, 1945, page 1427 (Mo. R.S.A., Sections 1880.1-1880.4) providing for preservation of official records by photographing, micro-photographing or photostating the same and subsequent disposal of the original records on authorization of the Governor. This law is directed to a manner of preservation and does not contain authority to diminish or destroy contents of records to be preserved.

CONCLUSION

It is the opinion of this department that the Commissioner of the Division of Finance is without authority to dispose of records required to be kept in his office by virtue of the provisions of Section 7884, R. S. Missouri, 1939, as amended, except in the manner provided in House Substitute for House Bill No. 626, Laws of Missouri, 1945, page 1427.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

CBB
J. E. TAYLOR
Attorney General

JLO'M/feh

SWAMP LANDS: The Governor may relinquish the title of the State of
GOVERNOR OF Missouri to swamp land which was sold by the United States
MISSOURI: Government after the passage of the law donating said
lands to the State of Missouri when authorized so to do
by the County Court of the County in which such land is
located.

July 13, 1950



7/14/50

Honorable Forrest Smith
Governor, State of Missouri
Jefferson City, Missouri

Dear Governor Smith:

We are in receipt of your request for an opinion of this office asking whether the order of the County Court of Polk County is sufficient in itself to warrant your relinquishing the title of the State of Missouri to the land described therein, particularly under Section 12774, Revised Statutes of Missouri, 1939.

You quote the order of the County Court of Polk County as follows:

"IN THE COUNTY COURT OF POLK COUNTY, MISSOURI.

"BE IT REMEMBERED, that on this 20 day of June, 1950, the same being the 16th Judicial day of the May, 1950, Term of the County Court of Polk County, Missouri, the following among other proceedings, were had and entered of record, to wit:

"On this day came Earl E. Duncan and Agatha L. Duncan, husband and wife, who show to the Court that they are husband and wife and as such are in possession of and claiming to own in fee simple the Northeast quarter of the Northeast quarter of Section 23, Township 33, of Range 23, in Polk County, Missouri, and that they claim to own the same under, by, and through John West who entered said Northeast quarter of the Northeast quarter of Section 23, Township 33, of Range 23, on March 19, 1855, and to whom a patent was issued by the Government of the United States purporting to convey said land to him under date of October 1, 1858, and said parties further show to the Court that after their predecessor in title, John West, had entered said land as aforesaid, that the same land was selected by the State of Missouri as

Honorable Forrest Smith

swamp land under the Act of Congress of September 28, 1850, and through oversight said selection was approved on January 17, 1857, and a patent was issued thereon by the United States Government unto the state of Missouri, under the date of March 26, 1857, purporting to convey said land to the State of Missouri.

"Said parties further show to the Court that John West had complied with all requirements of the law as to entrymen before the swamp selection by the State of Missouri was approved, and the Court therefore finds that the above described land had been sold by the Government of the United States after the passage of the law, donating said land to the State of Missouri, and by reason thereof, under and by virtue of provision of Section 1277¹/₄ of the Revised Statutes of the State of Missouri, 1939, it is HEREBY ORDERED, ADJUDGED AND DECREED by the Court that Polk County, Missouri, by and through this order of the County Court of said County, does hereby authorize His Excellency, the Governor of the State of Missouri, to be, and he is hereby authorized to relinquish the title of the State of Missouri to said swamp and over-flowed land, namely the Northeast quarter of the Northeast quarter of Section 23, Township 33, of Range 23, in Polk County, Missouri, unto the said Earl E. and Agatha L. Duncan, husband and wife, of Polk County, Missouri.

"STATE OF MISSOURI()
COUNTY OF POLK () SS

"I, Francis H. Roberts, Clerk of the County Court, of Polk County, Missouri, do hereby certify that the above and foregoing judgment and decree is a true copy of the same as it appears in my office.

"IN WITNESS WHEREOF, I hereunto set my hand and the official seal of said Court this 20 day of June, 1950.

FRANCIS H. ROBERTS /s/
CLERK OF THE COUNTY COURT
POLK COUNTY, MISSOURI'

(S E A L)

"Would you kindly advise whether or not this is sufficient, in itself, to warrant my relinquishing the title of the State of Missouri to the described land under the laws of this state, and particularly

Honorable Forrest Smith

under Section 12774, R. S. Mo. 1939."

Section 12774, Revised Statutes of Missouri, 1939, authorizes the governor of the state to relinquish title of the state to swamp and overflow land which has been sold by the United States since the passage of the law donating said lands to the State of Missouri "whenever the counties interested in said lands may, by an order of the county court, authorize him so to do." This statute was first passed in 1859 (Laws of 1859, page 50). It refers to lands granted to the State of Missouri under an act of Congress approved September 28, 1850 (43 U.S.C.A., Sections 982-984). By an act of the General Assembly passed in 1851 (Laws of 1851, page 238), the lands were donated to the respective counties in which they were situated.

In the selection of the swamp lands, some selections were made and patents issued to the State of Missouri conveying tracts which have been entered by individuals and to which patent had been or was thereafter issued by the United States conveying the land to individuals.

Section 12774 has not been judicially construed, but quite plainly was enacted to provide for the relinquishment of the title of the state to the individual to whom the land was patented by the United States. The title of the state actually had passed to the counties under Section 12752, Revised Statutes of Missouri, 1939.

The order of the County Court, above quoted, recites adequately and properly that "John West had complied with all requirements of the law as to entrymen before the swamp selection by the State of Missouri was approved, and the Court therefore finds that the above described land had been sold by the Government of the United States after the passage of the law, donating said land to the State of Missouri." While the county court now has no judicial power it does have the general management of the business of the county, and it is believed that such determination by the county court may be considered adequate evidence of the facts therein stated. The order, however, does not show any determination or any evidence that Earl E. Duncan and Agatha L. Duncan, husband and wife, are the present owners of the land. It shows merely that they are "in possession of and claiming to own in fee simple" the land. The order does not show whether they claim by mesne conveyances from John West, the patentee or otherwise. The County Court of Polk County does not have any authority or power to determine the title to real estate. Their determination that the title to the land described in the above letter be relinquished unto Earl E. and Agatha L. Duncan, husband and wife, is not a legal finding that said parties are the present owners of said land.

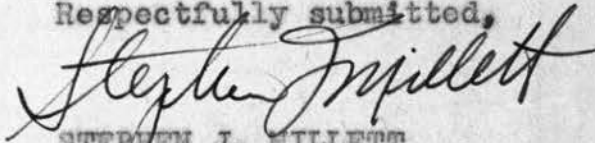
Honorable Forrest Smith

The statute (Section 12774) authorizes the governor to relinquish the title to said land when authorized by an order of the county court. It does not purport to be mandatory in its terms, and under the statute the governor may relinquish title if, in his discretion, such relinquishment seems proper. Under the order of the county court in this case, the governor may properly relinquish title if, in his discretion, the evidence is sufficient to authorize the relinquishment to the persons desiring such conveyance. The governor may require such evidence as he deems proper as to the propriety of executing the conveyance. It would not be unreasonable for the governor to require in this case an abstract of title or other evidence that Earl E. Duncan and Agatha L. Duncan, husband and wife, are the present owners of the land.


CONCLUSION

It is the opinion of this department that under the provisions of Section 12774, Revised Statutes of Missouri, 1939, the governor may properly relinquish the title of the State of Missouri to swamp land which was sold by the United States after the passage of the law donating said lands to the State of Missouri when authorized so to do by an order of the county court of the county in which such land is situate. The statute is not mandatory and the governor in his discretion may require proof that the persons desiring the conveyance are the present owners of said land.

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SJM:mw

MISSOURI RURAL REHABIL-
ITATION CORPORATION

) Dissolved corporation may not
) be revived. Act of Legislature
) necessary to permit Missouri
) to apply for return of assets
) held by Secretary of Agriculture.

*former under provisions
of Article 10, Chapter
32, R. S. Missouri, 1939
Missouri Rural
Rehabilitation Corp*

September 6, 1950

9-19-50

Honorable Forrest Smith
Governor of Missouri
Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Attached is a letter from Mr. Dillard B. Lasseter of the Farmers Home Administration concerning certain funds originally provided the State of Missouri for a Rural Rehabilitation Program. I would appreciate very much having an opinion from you as to whether the State of Missouri has the right, without legislative action or authority, to revive the Missouri Rural Rehabilitation Corporation."

The enclosed letter from Mr. Lasseter, to which you refer, states that the Missouri Rural Rehabilitation Corporation was incorporated at the instance of the Federal Government on September 5, 1934, under the provisions of Article 10, Chapter 32, R. S. Missouri, 1939, for the purpose of facilitating the administration of a rural rehabilitation program in the State of Missouri with funds appropriated under the Federal Emergency Relief Act of 1933 and certain other Federal statutes. The letter further states that the original plan called for the administration of the program by the State rural rehabilitation corporations by grants from the Federal

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Government. However, it became necessary by reason of a ruling of the Comptroller General to administer the program as a direct Federal activity, and, therefore, on October 31, 1936, the Missouri Rural Rehabilitation Corporation transferred its assets to the United States in trust for the purpose of carrying on a rural rehabilitation program in the State of Missouri. As of April 30, 1950, the assets now being administered by the government had an approximate face value of \$2,646,212. Congress by the "Rural Rehabilitation Corporation Trust Liquidation Act" (Public Law 499, 81st Congress, approved May 3, 1950) has authorized liquidation of the funds now held by the Secretary of Agriculture.

The letter from Mr. Lasseter further states:

"Briefly, this Act authorizes: (1) upon appropriate application, the outright return of the assets to each state rural rehabilitation corporation, or if a rural rehabilitation corporation of any state has been dissolved and is not revived or reincorporated, to such agency or state official as may be designated by the state legislature; (2) upon appropriate application, return of the title in the assets to the corporation or state agency or official with authority for the Secretary of Agriculture and the corporation or state agency or official to make a new agreement for the administration of the assets by the Secretary; and (3) the covering of the trust assets into miscellaneous receipts of the United States Treasury upon disclaimer or release by the state legislature or if, upon the expiration of three years from the date of the act, appropriate application has not been made for the return of the trust assets."

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"The Missouri Rural Rehabilitation Corporation was dissolved on March 7, 1940, and, therefore, there is at this time no proper legal entity which might make application for the return of the trust asset pursuant to the provisions of Public Law 499. For that reason, I thought it advisable to apprise you of the foregoing facts in order that you may, if you so desire, refer this matter to your Attorney General to solicit his comments with respect to the possibility of reviving the now dissolved Missouri Rural Rehabilitation Corporation, or suggesting appropriate legislation by the state legislature which would enable some agency or state official to make application for return of the trust assets, or to enter into an agreement with the Secretary of Agriculture for future administration of the assets pursuant to section 2(f) of Public Law 499."

The Missouri Rural Rehabilitation Corporation does not appear to have been organized pursuant to any statutory authorization by the Legislature of this state. It was organized under the provisions of Article 10, Chapter 32, R. S. Missouri, 1929 (Article 10, Chapter 33, R. S. Missouri, 1939), which provides for the organization of benevolent, religious, scientific, fraternal-beneficial, educational and miscellaneous associations.

Section 5461, R. S. Missouri, 1939, provides for the dissolution of corporations organized under such article. According to the letter from the Farmers Home Administration, the Missouri corporation was dissolved on March 7, 1940. There is no provision in Article 10 of Chapter 33 authorizing the revival of the corporation organized thereunder once it has been dissolved. Therefore, we are of the opinion that the old Missouri Rural Rehabilitation Corporation may not be revived.

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As for the formation of a new corporation, as pointed out above, there is no statutory authorization for the organization of such corporation to function as an agency of the State of Missouri. Therefore, we fail to see how a new corporation might function on such basis.

Thus, it appears that the only way in which the State of Missouri might take advantage of the offer of the return of the assets to this state is by action of the Legislature to authorize some agency or official of the state to apply for the transfer of such assets, and further authorizing the conduct of a program for the use of such assets in accordance with the Rural Rehabilitation Corporation Trust Liquidation Act. We might point out that it does not appear from the letter of Mr. Lasseter just what the assets held for the benefit of this state now consist of.

Furthermore, examination of appropriation acts of the General Assembly passed subsequent to the formation of the Missouri Rural Rehabilitation Corporation do not indicate that any state funds were ever appropriated by the Legislature of Missouri for the use of such corporation.


CONCLUSION

Therefore, it is the opinion of this department that the Missouri Rural Rehabilitation Corporation may not be revived, and that the only manner by which the State of Missouri might apply for the return of assets now held by the Secretary of Agriculture on transfer from the Missouri Rural Rehabilitation Corporation is by legislation authorizing some state agency or official to apply therefor and to administer such funds, when and if received.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh

SOCIAL SECURITY: The State may, under the provisions of the Constitution of this State, enter into an agreement with the Federal Government extending old age and survivor insurance benefits to employees of the State and employees of its political subdivisions in conformity with the Federal Social Security Act.

November 24, 1950



Honorable Forrest Smith
Governor of the State of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Smith:

This will be in reply to your letter of recent date requesting our opinion on the extension of the Federal Social Security Act by Public Law 734 - (H.R. 6000), recently passed by the Congress of the United States to permit the several States to enter into agreements with the Federal Government providing for the extension of old age and survivor insurance benefits under the Federal Social Security Act for the employees of such States and such political subdivisions. Your letter reads as follows:

"On August 28, 1950, President Truman signed the Social Security Act Amendments of 1950, making several major changes in the Federal Social Security Act. This Act is known as Public Law 734 - 81st Congress (H.R. 6000). One of the changes in the Act was made by adding a new section, known as Section 218 (a), which provides for voluntary agreements between States and the Federal government for coverage of State and local employees under the Old Age and Survivors Insurance provisions of the Social Security Law.

"I would appreciate your reviewing the above amendment to the Social Security Law and advising me on the following questions:

"(1) Could the State of Missouri under its Constitution enter into an agreement with the Federal government for coverage of State employees?

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"(2) If the answer is 'Yes' to question No. 1 what legislation would have to be enacted to enable this State to enter into such agreement?"

The Act referred to in your letter is an amendment to Title II of the Federal Social Security Act.

Your letter presents two questions:

1) May the State of Missouri under its Constitution enter into such an agreement with the Federal Government for such coverage of State employees and employees of political subdivisions of the State.

2) If the State of Missouri may enter into such an agreement what legislation should be enacted to authorize such an agreement with the Federal Government.

We shall consider first the question respecting the power of the State of Missouri under its Constitution to enter into such an agreement with the United States Government. It is a familiar rule applied by the Courts of the country that in the construction of constitutional provisions all parts of the Constitution are entitled to equal weight, and that each section must be considered in relation to the whole (12 C.J., page 708, State ex rel. vs. Hostetter, 137 Mo. 636, 1.c. 646). With this rule before us for our guidance we quote the following sections of our Constitution which should be construed in our opinion upon the first question you submit.

Sections 37 and 38(a) of Article III, and Sections 37 and 39 of Article IV, read, respectively, as follows:

Section 37, Article III:

"The general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor, except (1) to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date, (2) on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any one year and to be paid in not more than five years from its creation, and (3) when the liability exceeds one million dollars, the general assembly as on

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constitutional amendments, or by the people by the initiative, may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is approved by a majority of the qualified electors of the state voting thereon at the election, the liability may be incurred, and the bonds issued therefor must be retired serially and be installments within a period not exceeding twenty-five years from their date. Before any bonds are issued under this section the general assembly shall make adequate provision for the payment of the principal and interest, and may provide an annual tax on all taxable property in an amount sufficient for the purpose."

Section 38(a), Article III:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Section 37, Article IV:

"The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

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Section 39, Article IV:

"In all matters of public welfare the general assembly may provide by law for cooperation with the United States, or other states."

Section 37 of Article IV, supra, of the present Constitution of this State is an enabling provision authorizing the Legislature to create the Department of Public Health and Welfare and to grant power with respect thereto to counties, cities or other political subdivisions of the State.

Section 39, supra, of our Constitution is likewise an enabling provision without restrictions giving express authority to the General Assembly to provide by law for cooperation with the United States and other States under the subject of public health and welfare.

The Supreme Court of Missouri has not had before it any case to construe the terms of Section 39 of Article IV to determine the question of whether social security legislation to co-operate with the Federal Social Security Act to provide for the general welfare is valid. Eminent text authorities, the Courts of last resort of other States and the Supreme Court of the United States have held such legislation valid, respectively, under the constitutional provisions of such States and the Federal Constitution.

Our Supreme Court has, however, construed statutes and constitutional provisions of this State involving elements of public welfare where the question arose of the authority to pay public money to individuals for services performed by them for the public benefit. In such cases, such as the appropriation of public funds for cities, or to be paid hospitals, industrial homes, county farm bureaus which are formed by private citizens, for the establishment of a municipal airport, and other like matters, the Court has held that such services and enterprises were for public purposes and justified the payment therefor out of public funds, and that such payments did not violate the provisions of the Constitution prohibiting the use of public funds as a gift or grant to private individuals. (State ex rel. Crow, Attorney General, vs. City of St. Louis, et al., 174 Mo. 125; State ex rel. Industrial Home for Girls, 144 Mo. 275; Jasper County Farm Bureau vs. Jasper County, 315 Mo. 569).

The case of State ex rel. Crow, Attorney General vs. City of St. Louis, 174 Mo. 125, was considered by the Supreme Court on the constitutional question of the right of the city to appropriate public money to reimburse a city officer for money expended arising out of the discharge of his official duties. Holding that the

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appropriation of such funds and the payment thereof to the officer for such purposes were constitutional, the Court, l.c. 149, said:

"Here the municipal corporation had a duty to perform, rights to defend, and interests to protect in removing or having removed, the nuisance from the streets. The officer acted bona fide, within the scope of his duties, lawfully. The indemnity was legal and proper."

The above cases arose in the construction by the Court of Sections 47, 47(a) and 48(a) of Article IV and Section 6 of Article IX of the Constitution of 1875, which sections now in general terms and effect constitute Sections 23 and 25 of Article IV of our present Constitution, sections limiting the power of the Legislature to authorize the expenditure of public money.

The Supreme Court of this State in the case of State ex rel. City of St. Louis vs. Public Service Commission, 56 S.W. (2d) 398, long before the adoption of our present Constitution including Sections 37 and 39 of Article IV, in construing Section 5177, Article III, Chapter 33, R.S. Mo. 1929, and in holding an order of the Public Service Commission made under said Section unlawful, quoting 50 C.J., Section 95, page 867, defined "public welfare", l.c. 404, as follows:

"* * * The term 'public welfare' used in the quoted statute, stating the rule of construction of the Public Service Commission Act, is a comprehensive expression, and embraces the health, peace, morals, and safety of the community; that which is a public necessity or for the convenience of the public. * * * ."

Volume 48, Am. Jur., a late, excellent and much quoted text authority, Section 3, page 514, on the subject of legislation, respecting the general welfare under the Federal Constitution and similar provisions in Constitutions of several of the States, states the following:

"It is generally held that the Federal and state governments in the exercise of their police power to provide for the general welfare may enact appropriate legislation to safeguard the interests and protect the social security of employers, employees, and the public at large. * * * * *

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"Similarly, the fundamental and broader aspects of many of the state acts, designed to operate with the Federal Act, have been held constitutional by both the Federal and state courts. This is particularly the case with reference to state old-age and survivors' insurance, unemployment insurance, and old-age assistance legislation. * * *."

In support of this text in footnotes 4 and 9, respectively, are cited the cases of *Helvering vs. Davis*, (301 U.S. 619, 81 L. ed. 1307, 57 S. Ct. 904, 109 A.L.R. 1319) and the case of *Carmichael vs. Southern Coal and Coke Company* (301 U.S. 495, 81 L. ed. 1245, 57 S. Ct. 868, 109 A.L.R. 1327.) We are here referring to 109 A.L.R. 1319, in the *Helvering* case and to 109 A.L.R. 1327, in the *Carmichael* case, respectively.

The case of *Helvering vs. Davis*, supra, was a direct attack upon the provisions of Title II of the Federal Social Security Act passed August 14, 1935. Chapter 531, 49 Sta. at L. 620. The case was one where shareholders of a Massachusetts corporation sought to restrain the corporation from making the payments and deductions called for by the Act for the payment of old age benefits to cover monthly benefits and lump sum payments when the necessity for such lump sum payments might arise. The Federal District Court had dismissed the Bill filed by the shareholders to restrain the corporation from making the payments and deductions required by the Federal Social Security Act. The United States Circuit Court of Appeals on review, reversed the decree of the District Court. *Certiorari* followed and the case was thus before the United States Supreme Court. The Supreme Court reversed the decree of the Circuit Court of Appeals and affirmed the decree of the United States District Court of Massachusetts whereby the Bill to enjoin the corporation from making the payments and deductions required by the Act had been dismissed by the District Court, leaving the terms of the Act in force and effect. The Court in upholding the constitutionality of the Federal Social Security Act and in affirming the decree of the District Court, l.c. 1323, said:

"* * * The scheme of benefits created by the provisions of title II, is not in contravention of the limitations of the Tenth Amendment.

"Congress may spend money in aid of the 'general welfare.' Const. Art. I., Sec. 8; *United States v. Butler*, 297 U.S. 1, 65, 80 L. ed. 477, 488, 56 S. Ct. 312, 102 A.L.R. 914; * * *."

The case of *Carmichael vs. Southern Coal and Coke Company*, supra, grew out of an Alabama State Statute imposing upon employers the

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obligation to pay a certain per cent of their monthly payrolls, under the taxing power of that State, into the State Unemployment Compensation Fund. The Coal and Coke Company sought in the District Court of the United States for the Middle District of Alabama to enjoin the Attorney General (Carmichael), and other defendants, from the collection of money contributions imposed by the provisions of the Alabama Unemployment Compensation Act. The decree of the United States District Court sustained plaintiffs and enjoined defendants from the collection of such tax. In an exhaustive opinion the Supreme Court of the United States upheld the Alabama statute in its entirety, and held that the same was valid under both the Alabama Constitution and the Constitution of the United States. The Supreme Court of Alabama did likewise. The Supreme Court of the United States in the Carmichael case, l.c. 1331, 1332, taking note of the decision of the Supreme Court of Alabama said:

"In the court below, the statute was assailed as repugnant to various provisions of the state constitution. These contentions have been put at rest by the decision of the Supreme Court of Alabama in Beeland Wholesale Co. v. Kaufman. --Ala. --,-- So. --, holding the state act valid under both the state and federal constitutions.
* * * ."

It will thus be observed that the validity of the Federal Social Security Act and like legislation on the part of a State has been held valid and constitutional as an element of public or general welfare by the Supreme Court of the United States and the Supreme Court of the interested State, respectively, in their respective jurisdictions. We have cited Section 38(a) of Article III of our Constitution, and have set forth its terms herein, in considering all of the sections of the Constitution which might bear upon the question before us. We do not believe that there is any part of said Section 38(a) that would limit the express power and authority created in Section 39 of Article IV of the Constitution authorizing the enactment of legislation by the General Assembly for the State to co-operate with the Federal Government in the extension of the benefits of old age and survivor insurance to employees of the State and employees of subdivisions thereof under the Federal Social Security Act. Said Section 38(a) is a provision of limitation respecting the use of State funds and credit, but it does clearly recognize the use of public funds for old age assistance and for participation in federal aid. The terms of said Section 38(a), we believe, may be reasonably construed to be in support of any need which might arise for the enactment of legislation in furtherance of social security as an incident of public welfare and not in conflict with said Section 39 of Article III.

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Among such sections of our Constitution cited and quoted herein and to be considered in the preparation of this opinion, is Section 37 of Article III. We have examined and studied this section particularly as possibly limiting legislation for the co-operation by this State with the Federal Government in such extension of the benefits of the Federal Social Security Act, as is expressly authorized in said Section 39 of said Article III. Consideration and study of said Section 37 has been directed to the particular provision therein to determine whether it contains a limitation upon the power of the State to contract with the Federal Government for the extension of such benefits as are provided in said Public Law 734 (H.R. 6000), provided an obligation or liability upon the State were fixed by reason of such contract, in excess of One Million Dollars per year. The authorities we have read in the research and study we have given to this question convince us that the section is not in conflict with, in any sense, nor does it constitute any limitation upon the express powers provided in Section 39 granting the General Assembly unrestricted authority to legislate to co-operate with the United States in matters of public health and welfare, and of course, the purpose of such legislation and the whole undertaking would be connected with and in the interest of public welfare. The Supreme Court of this State in the case of *State ex rel. vs. Smith*, 175 S.W.(2d) 831, gave its construction of the meaning of Section 48 of Article IV, and in its discussion of the provisions of that section, construed also the provisions of Section 44, both of the Constitution of 1875 of this State. The provisions of Section 44 of the 1875 Constitution are in much the same language, although abbreviated, as now stands said Section 37 of Article III of our 1945 Constitution. The case arose, as stated, principally upon the construction of Section 48 of Article IV respecting claims of salaries of officers of the Board of Registration of Architects and Professional Engineers out of a separate fund of monies collected by the Board. Reciting, in part, the provisions of both of said Sections 48 and 44 there being construed and which are pertinent to the question here, and holding that Section 44 of Article IV of the Constitution of 1875, now in effect Section 37 of Article III of our present Constitution, was confined to contracts creating a debt or obligation upon the State through the issue of bonds or otherwise, the Court, 1.c. 832, 833, said:

"Section 48, Article IV of the Constitution, Mo. R.S.A., provides: 'The General Assembly shall have no power to * * * pay nor authorize the payment of any claim * * * created against the State * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void.'

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"Section 5 of the act creating the board, Mo. R.S.A. Sec. 10139.5, states: 'The Board shall appoint a secretary who shall also be the treasurer of said Board * * *.' Section 6, Mo. R.S.A. Sec. 10139.6: 'The Board shall have power to employ such consultants * * * and may make expenditures of the fund herein provided for any purpose which in the opinion of the Board is reasonably necessary for the proper performance of its duties under this Act, including the purchase of supplies * * *.' Section 8, Mo. R.S.A. Sec. 10139.8: 'The compensation of all employees shall be * * * commensurate with their duties. * * *' These sections expressly authorize the contracts upon which the claims here involved are based and the constitutional prohibition is not applicable to them.

"Nor has Section 44, Article IV of the Constitution any application to the claims. It provides: 'The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue bonds or other evidences of indebtedness thereof, * * *.' This section is a restriction on the power of the legislature to raise revenue through the issuance of bonds and otherwise."

We do not believe that it would be possible for a condition to ever arise where it would be necessary or permissible to undertake to raise funds from bonds to be used as contributions to a fund to be created to meet the terms of such a contract entered into by the State with the Federal Government because such funds would be the lawful and orderly subject of appropriations from time to time of public money provided for in legislation necessary and appropriate to provide for the extension of such benefits under the Federal Social Security Act to employees of the State and employees of political subdivisions thereof. We believe the entry into such contract by the State would not and could not, under the Court's construction of what now is our Section 37 of Article IV of the Constitution of 1945, in *State ex rel. vs. Smith, supra*, create a debt or liability upon the State unless the contract itself requires the State to issue bonds or obligations, the payment and discharge of which would require the issue of bonds.

The distinction to be observed between the creation of a debt, under constitutional authority by the State either at all,

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or in excess of an amount authorized by the Constitution, or to be provided and spent within a definite period as to amount and the appropriation and use of public funds on hand and derived from the collection of revenue is stated in 59 C.J. page 225, as follows:

"* * * An obligation, although amounting to a technical debt, is not forbidden by the provisions of the constitution limiting either its creation or its amount, if funds are in the treasury to meet it, or if the uncollected revenue provided for the year in which it is created will be sufficient to meet it when collected, although payment is deferred; obligations that run current with revenues are not debts within a constitutional limitation. Likewise, an appropriation from public funds available for that purpose does not create a debt within a constitutional limitation, nor a mere transfer from one fund to another of money in the treasury, nor an appropriation of revenue assessed and in process of collection, or of revenue provided for by the revenue laws, even though the appropriation is in anticipation of such revenue; nor does the issuance of a state warrant, where the money is in the treasury, or where a tax levy has been made with provision for its collection, create a debt within a constitutional limitation; likewise, the issuance of treasury notes, in anticipation of revenues from taxes levied, does not incur an indebtedness within a constitutional limitation."

We believe that the General Assembly has express and adequate authority under Section 39 of Article IV of the Constitution of this State to enact legislation permitting the State to enter into such a contract with the Federal Government as is contemplated in said amendment to Title II of the Federal Social Security Act to extend the benefits of old age and survivor insurance to employees of the State and political subdivisions of the State, and that there is no provision in any other section of our Constitution restricting or limiting the full power so provided in Section 39 of Article IV provides that the State "In all matters of public welfare the general assembly may provide by law for cooperation with the United States, or other states." Webster's New International Dictionary, Second Edition, page 585, defines "co-operate" as: 1. "To act or operate jointly with another or others; to concur in action, effort, or effect." 2. "To join in economic co-operation."

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We believe, under the above authorities cited and discussed and under the express provisions of Section 39 of Article IV of our present Constitution, that the General Assembly has authority to enact appropriate laws authorizing the State to enter into an agreement with the Federal Government for the extension of old age and survivor insurance benefits under the Federal Social Security Act for the employees of the State and its political subdivisions and to appropriate and use public funds of the State and such political subdivisions of the State for such purposes.

We have given attention and study to the contents and provisions of the said amendment itself, and have made an extensive research of existing social security legislation, text authorities, and decisions by the Courts of the country pertinent thereto, and as the result of our research it is our opinion that in answer to your second question a comprehensive enabling Act should be passed by the Legislature creating a State agency to make application to enter, and actually enter, into an agreement with the Administrator of the Federal Social Security Act as provided in Section 218, an amendment of Title II of that Act, such agreement to contain such provisions as the State may request for the extension of the benefits of the old age and survivor insurance system, now existing under the Federal Social Security Act, to services performed by individuals as employees of the State, or any political subdivision thereof, or instrumentality thereof, as provided in said Section 218 of said Title II and consistent therewith. Such Act, when passed, should include sections with provisions similar to the following abbreviated outline:

1) Declaring that, in order to extend to the employees of this State and its subdivisions and their instrumentalities and to dependents and survivors of such employees, the benefits of the protection accorded to others by the old age and survivor insurance system contained in the Federal Social Security Act, it is the public policy of this State that agreement be made with the administrator of the Federal Social Security Act upon the request of this State so that the provisions of said Federal Act will be extended to the employees of the State of Missouri and its political subdivisions and instrumentalities under said Section 218 of said Act, as amended,

2) Giving adequate definitions of subjects and terms to be applied in said agreement affecting the extension of such benefits to the State, its political subdivisions and instrumentalities as employers, such as the meaning of "employees", "employment", "services covered", "Federal agency", "Federal Insurance Contributions Act", "Instrumentality", "political subdivision", "Federal Social Security Act", "State agency", and "wages", and such other definitions of terms, entities, words, phrases and subjects as may be deemed necessary by the Legislature in framing such legislation.

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3) The creation of a State agency to enter into such agreement with the administrator of the Federal Social Security Act as amended by Section 218, Title II of said Act, to secure the extension of such benefits to such employees and their survivors, and providing for the powers to be exercised by said State agency, the appointment and qualifications of the members of such agency, their terms of office and the filling of vacancies in such agency.

4) Classifying employees and the services performed by them in conformity with the terms of such agreement, and consistent with the provisions of the Federal Social Security Act.

5) Providing for the withholding and collection from the wages of such employees of the State, its political subdivisions and instrumentalities as employers, and the payment by such employers of such employees as an excise tax or other method, contributions to a Contributions Fund to make effective the benefits provided for and intended by the terms of the Federal Social Security Act, this Act and such agreement when made.

6) Providing for the effective date of the agreement, respecting services of such employees, the percentage of their wages required to be withheld and contributed to such fund, the payment thereof by the State agency, or such other official as may be custodian of the Contributions Fund, to the administrator of the Federal Social Security Act in conformity with such agreement, the other terms of this Act and in conformity with the provisions of the Federal Social Security Act, including adjustments of overpayment or under-payment of such contributions and refunds due such employees under such regulations as may be provided by the Federal Social Security Act.

7) Providing that such agreement may include a joint plan by two or more entities for the extension of such benefits to their employees if any one of them would be unable to submit an approvable plan for such benefits, providing that each plan contains provisions showing compliance with the agreement, the terms of this Act, applicable Federal law, provisions showing all services covered in such plan or employment under this Act and under the Federal Social Security Act.

8) Providing for assurance that the source, or sources, from which payments are required to be made by the State, political subdivisions, or instrumentalities, will be adequate to supply such funds; providing for the methods and the adoption of rules and regulations as may be deemed proper for the administration of the plan by such entities; providing for reports to be made to the State agency, showing compliance with the provisions of this Act and the Federal Social Security Act, authorizing the State agency to terminate a plan, after notice, upon the failure

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of any member of a unit to substantially comply with all applicable laws and conditions pertaining thereto; providing that the State agency may not finally refuse to approve a plan without notice and opportunity for hearing by any unit or any member of a unit containing more than one member; providing for the payment of contributions into the fund from wages, and at such times as are specified in this Act and at rates specified in the agreement, consistent with the provisions of the Federal Social Security Act in amounts not exceeding amounts imposed by Section 1400 of the Internal Revenue Act, if such instant wages would constitute employment under the meaning of that Act, and to deduct such contributions from the wages in discharge of the liability of such entity, but if not withheld and paid, as required as to amounts, neither the employee nor the employer shall be released of the Contributions Fund itself and defining the sources from which such funds are to be derived; providing for the safe custody of such fund, and that payments therefrom shall be made solely to the administrator of the Federal Social Security Act pursuant to such agreement, or the payment of refunds provided for in this Act, and applicable Federal law; providing for biennial appropriations from the contributions paid into the Contributions Fund, to be available for the purposes of the Act until expended, and such additional sums as are found to be necessary in order to make the payments due from any entity to the administrator of the Federal Social Security Act, which the State is obligated to make pursuant to such agreement.

9) Providing that the State Agency shall submit at each regular biennial session of the General Assembly, at a reasonable time in advance of the beginning of the session, an estimate of the amounts authorized to be appropriated to the Contributions Fund by the State, and/or political subdivisions as provided in this Act for the next appropriation period.

10) Providing that the State agency shall make and publish such rules and regulations not inconsistent with the provisions of this Act as it finds necessary or appropriate to the efficient administration of the functions with which it is charged, not inconsistent with applicable Federal law,

11) Providing that the State agency shall make studies of old age and survivor protection for employees of the State and such other entities as may be included in such agreement, and report their recommendations covering the operation of such agreement and plans approved under this Act and that a report thereof be submitted to the General Assembly at the beginning of each regular session concerning the effect and operation of this Act during the preceding biennium, including such recommendations for amendment to the Act as it considers proper and necessary, and,

Honorable Forrest Smith

12) Providing such other measures and terms as, in the judgment and discretion of the Legislature, may be deemed necessary for the efficient administration of this Act under such agreement, and in conformity with applicable Federal law.

CONCLUSION

It is, therefore, the opinion of this Department:

1) That under the provisions of the Constitution of this State the State of Missouri may pass legislation authorizing the State to enter into an agreement with the Federal Government, for extending old age and survivor insurance benefits provided for in the Federal Social Security Act to employees of the State and its political subdivisions.

2) That to effectuate such an agreement, legislation substantially similar to the plan hereinabove suggested should be enacted by the Legislature.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

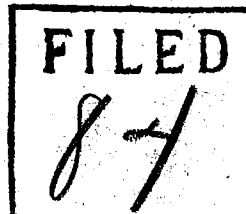
J. E. TAYLOR
Attorney General

CRIMINAL PROCEDURE

INDICTMENT AND INFORMATION

) Information drawn in language of Section
) 4456, R. S. Mo. 1939, charging larceny of
) money in excess of \$30, will support conviction thereunder, if only special rather
) than general ownership of property is proved.
If property subject to larceny be located in a place properly designated as a dwelling house, the charge may be laid under Section March 1, 1950 4459, R. S. Missouri, 1939.

Honorable Edward W. Speiser
Prosecuting Attorney
Chariton County
Keytesville, Missouri



Dear Sir:

The following opinion is in answer to your recent request, reading as follows:

"I would like to have your opinion on the following matter.

"During the month of October, 1949, gold coins having a face value of approximately \$1500.00 were stolen by the defendant from a dwelling located in this county. The evidence shows that these gold coins, consisting of \$5.00, \$10.00 and \$20.00 denominations, had been accumulated by Mr. and Mrs. John Taylor, now deceased, during their lifetime and were concealed in the basement of their home in this county. They both died intestate, leaving as their heirs three children. Immediately after the death of the survivor, Mrs. Taylor, the children made a search about the premises for the gold, but were unable to locate it. In October, 1949, the defendant, with several other workmen, was engaged to make some repairs in the basement. It seems that a wall of the basement had caved in and needed restoring. This defendant, in the process of carrying out the debris from the basement, discovered about \$1500.00 in gold coins, which presumably are the same gold coins accumulated and hidden by the parents. The defendant converted the coins to his own use and later disposed of them

Honorable Edward W. Speiser

by sale to unidentified parties, except for a few single coins which were sold to certain known parties. Defendant admits taking the gold coins and disposing of them, claiming he sold the bulk of it for \$1000.00. He delivered the \$1000.00 to the Missouri State Highway Patrol, stating to them that it belonged to the said Taylor children.

"On the basis of this information a charge of grand larceny was filed, and at the present time, defendant is under a \$1000.00 bond for his appearance for arraignment in Circuit Court on February 9. After full consideration of this case and after consulting the Federal laws dealing with gold coins, it appears that perhaps ownership of this gold cannot be alleged to be in these children, but that ownership was in the United States Government at the time of the taking of the gold. Under this statement of facts, assuming that the corpus delicto can be established, is there a basis for a charge of grand larceny from the children of Mr. and Mrs. John Taylor, or perhaps should the information state that it was the property of the United States Government, or further still, should the indictment state that the owners of the property are unknown? Of course, if it had been any other personal property there would be no question but that the property taken belonged to the Taylor children, but since the property taken was gold coins, then whom should we allege as having ownership?

"I am enclosing a copy of the information I have filed. I would appreciate it if your office would redraft the information so that it would contain the properly stated charge, if the present information does not properly state the charge. This case is set for trial March 16, therefore, I would particularly like to have your opinion not later than March 1, if at all possible."

Under the facts submitted in your opinion request the evidence will clearly establish a larceny of over thirty dollars, and hence the information may be drawn in the language of Section 4456, R. S. Missouri, 1939, and no allegation need be made that the larceny was from a dwelling house. In the case of State v. Martin, 208 S.W. (2d) 203, 357 Mo. 368, the Supreme Court of Missouri decided this point in the following language found at 357 Mo. 368, 1. c. 372:

" * * * The information here is based on Section 4456, which does require stolen personal property, outside of livestock, to be of a

Honorable Edward W. Speiser

minimum value of \$30. to constitute the crime of grand larceny. A dwelling house has nothing to do with the case."

Section 3943, R. S. Missouri, 1939, provides as follows:

"When any offense shall be committed upon or in relation to any property belonging to several partners or owners, the indictment or information for such offense shall be deemed sufficient if it allege such property to belong to any one or more of such partners or owners, without naming all of them."

For the purpose of drafting the information in the case at hand it is not necessary to determine that the United States Government is the general owner of the property which was the subject of the larceny. It is enough for us to establish a special ownership in named parties as against the person committing the larceny. In *State v. Lackey*, 132 S.W. 602, 230 Mo. 707, the Supreme Court of Missouri spoke as follows at 230 Mo. 707, 1. c. 715:

"As stated in the preceding excerpt from *Greenleaf*, the ownership necessary to support a charge of larceny may be either general or special and the possession of such owner may be actual or constructive. If the property stolen is in the actual possession of a person other than the general owner, the latter has a constructive possession, and the ownership in such case may be properly alleged and proven either in the special owner, having the actual possession, or in the general owner having a constructive possession by reason of such ownership."

The principle enunciated in *State v. Lackey*, supra, was restated in *State v. Nicoletti*, 344 Mo. 86, 125 S.W. (2d) 33. The purpose behind the requirement that ownership, of property which has been the subject of larceny, must be alleged in the information, is clearly stated in the following language found in *State v. Flowers and Jones*, 278 S.W. 1040, 311 Mo. 510, 1. c. 518:

" * * * While it is essential to a charge of larceny that the ownership of property stolen

Honorable Edward W. Speiser

must be averred, this requirement is made, as above stated, in order that it may be shown that such ownership was in another than the thief; the exact title, therefore, of the property stolen is of no concern to the latter in making his defense and proof of same need not be of the cogent character to sustain a conviction."

Section 3951, R. S. Missouri, 1939, a curative statute in our criminal code, provides as follows:

"Whenever on the trial of any felony or misdemeanor, there shall appear to be any variance between the statement in the indictment or information and the evidence offered in proof thereof, in the christian name or surname, or both christian name or surname, or other description whatsoever, or any person whomsoever therein named as or described, or in the ownership of any property named or described therein, such variance shall not be deemed grounds for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case and prejudicial to the defense of the defendant."

The opinion request does not disclose that the estates of Mr. John Taylor, or his wife, are in the process of administration. If such fact is the case, ownership of the stolen property should be alleged to be in their acting administrators or executors. Otherwise, ownership may be alleged to be in named persons, their heirs-at-law, devisees or legatees.

In determining what language should be used in the information charging larceny of money, the Supreme Court of Missouri, in *State v. Darby*, 165 S.W. (2d) 419, held an information good under Section 4456, R. S. Missouri, 1939, which merely described the money as "Three Hundred Dollars in good and lawful currency of the United States of America."

We submit the following suggested form of information, omitting caption and oath, to be used under the facts stated in your opinion

Honorable Edward W. Speiser

request, if you decide to charge the offense under Section 4456, R. S. Missouri, 1939:

Edward W. Speiser, Prosecuting Attorney within and for the County of Chariton, State of Missouri, on his oath of office informs the Court that Hubert Anspaugh, on or about the ____ day of October, 1949, in the County of Chariton and State of Missouri, did then and there wilfully, unlawfully and feloniously, steal, take and carry away Fifteen Hundred Dollars in good and lawful gold coin of the United States of America, the joint property of C. W. Taylor, D. A. Taylor and Gertrude Thorne, then and there being, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Missouri.

Since receiving your opinion request this office has communicated with you by telephone and you have supplemented the facts appearing in the opinion request by informing us that the house from which the money was taken was, at the time of such taking, the actual dwelling house of C. W. Taylor. This additional fact will enable us to broaden the scope of our opinion.

Since C. W. Taylor was residing in the dwelling house at the time the money was taken, we now will discuss the alternative procedure which is available to you under Section 4459, R. S. Missouri, 1939, which reads as follows:

"If any larceny be committed in a dwelling house, or in any boat or vessel, or in any railroad car, or street car or interurban car, or by stealing from the person, if the value of the property taken is thirty dollars or upwards, the offender shall be punished by imprisonment in the penitentiary not exceeding seven years."

In the case of State v. Flowers and Jones, 278 S.W. 1040, 311 Mo. 510, the Supreme Court of Missouri was passing on the sufficiency of evidence to sustain a charge of larceny from a dwelling house

Honorable Edward W. Speiser

under Section 3315, R. S. Missouri, 1919, now Section 4459, R. S. Missouri, 1939. The following language was used at 311 Mo. 510, l. c. 516:

" * * * In whatever place, therefore, it may be located at the time it is stolen, if such place can properly be designated a dwelling house, the offense of a larceny therein is committed, as defined in the statutes under which the information was drawn. * * *"

In preparing your information under Section 4459, R. S. Missouri, 1939, ownership of the property should be alleged to be in C. W. Taylor, D. A. Taylor and Gertrude Thorne, and the dwelling house should be referred to as the dwelling house of C. W. Taylor.

CONCLUSION

It is the opinion of this office that an information alleging larceny of money described as gold coin of the United States of America of a value in excess of thirty dollars, under Section 4456, R. S. Missouri, 1939, is sufficient if phrased in the language of the statute; and that an allegation of ownership of such property which proves to be special in character is sufficient to sustain a conviction obtained thereon. If property which is the subject of larceny is located in a place which can properly be designated as a dwelling house, such larceny may be charged under Section 4459, R. S. Missouri, 1939.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M/feh

SCHOOLS: Division of Health authorized to provide educational instruction for children patients in tuberculosis hospital at Mt. Vernon;
HEALTH: school district to provide special classes for crippled children if ten or more are found in district.

April 12, 1950

Honorable George A. Spencer
Missouri House of Representatives
State Capitol Building
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"It has been called to my attention that the children kept at Mt. Vernon, the crippled children at the hospital here in Columbia and the children in the Blosser Home in Marshall have no public education provided for them.

"I have checked Senate Committee Substitute for House Bill No. 126, and I am wondering if that bill would permit public funds to be used for this purpose. Have you written an opinion on this matter?

"I would also like to know who should pay for this education if the above House Bill does not cover this matter. It is my understanding that all children of school age should be provided public education and it appears that there are three groups here that are not receiving it, and I would like to know why they are not receiving it from a legal standpoint, and in your opinion why they are not receiving it.

"It appears that this would be a problem that should come under the Department of Special Education, which should provide public education for these three groups of children."

Honorable George A. Spencer

The State of Missouri in its organic law has long recognized the importance of providing free public education for children. Section 1, Article IX of the Constitution of 1945, provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

The above section is substantially the same as Section 1, Article XI of the Constitution of 1875.

The mandate of the above-quoted section of our Constitution lodges the responsibility with the General Assembly to establish and maintain free public schools for the instruction of all persons in the state up to twenty-one years, as prescribed by law. We believe that the Legislature has complied with the Constitution by establishing free public schools for the gratuitous instruction of the children within the state, which may be attended by defective children as well as normal children, if they are able to so attend.

The type of incapacitated children referred to in your letter are those afflicted with tuberculosis who are hospitalized at the sanatorium at Mt. Vernon and the crippled children in the hospital at Columbia and in the Blosser Home at Marshall.

Regarding the children at Mt. Vernon, the Legislature has endeavored to provide for their education by the recent enactment of House Bill No. 201, enacted by the 65th General Assembly and approved August 3, 1949, and now incorporated as Sections 10405.2 and 10405.3, Mo. R.S.A.

Section 10405.2 provides:

"The Division of Health of the Department of Public Health and Welfare is hereby authorized to provide for the teaching and training of children who are resident patients confined in the State Trachoma Hospital at Rolla and the Missouri Tuberculosis Sanatorium at Mt. Vernon by employing certified teachers and instructors and purchasing equipment from any moneys appropriated for that purpose."

Honorable George A. Spencer

Section 10405.3 provides:

"The County Superintendent of Schools in counties where such hospitals are located shall establish standards, supervise training, and certify credits in the same manner as for children in organized school districts."

Under the provisions of the above-quoted act the Division of Health of the Department of Public Health and Welfare is authorized to provide for the teaching and training of the children patients in the sanatorium at Mt. Vernon and pay for same out of money appropriated for that purpose. The County Superintendent of Schools of Lawrence County, the county in which Mt. Vernon is located, is required to establish the standards, supervise training and certify credits for such children receiving instruction at the sanatorium in the same manner as for children in organized school districts.

Consequently, it appears that the Legislature has enacted specific legislation to provide for the education of the children in the sanatorium at Mt. Vernon.

Regarding the crippled children in the hospital at Columbia and in the Blosser Home at Marshall, we find no specific statute providing for their instruction as we did for the children who are resident patients at Mt. Vernon. However, with reference to certain types of defective children, Section 10351, Laws of Missouri, 1947, Vol. II, page 384, provides:

"Whenever in any school district there shall be found children between the ages of 6 and 20 years who are physically handicapped, including the blind or partially seeing, the deaf or hard of hearing, the crippled and the mentally deficient or mentally retarded, but who are capable of instruction, but yet who cannot be safely and adequately educated in the public schools with normal children, the board of education or board of directors of the district may provide appropriate instruction in special classes for such children, and when provision is made for such special classes and instruction, shall provide transportation to and from school for such of said children as cannot otherwise attend such school. Instruction, which is adapted to the varying physical and mental capacities and handicaps of the children

Honorable George A. Spencer

must be provided for such children in accordance with regulations prescribed by the state commissioner of education; Provided, however, when any of the children named herein cannot economically, safely or conveniently attend classes, the board of education or board of directors of the school district may provide a properly qualified and certified tutor, instructor, or home teacher for the purpose of instructing such children. Five hours of such tutoring or instruction in the homes of the children shall be considered to equal one week's school work per pupil. It shall be the duty of the board of education or the board of directors in each school district to ascertain annually the number of children of its district who belong to any of the above types."
(Emphasis ours.)

The above section in its reference and application to defective children includes the category of crippled children, as referred to in your letter.

In reading the above-quoted statute, and particularly the underscored language, it appears that the educational instruction of the defective children referred to therein is a discretionary matter with the school districts in which such children are found. Thus, the statute reads that "the board of education or board of directors of the school district may provide" appropriate instruction in the nature of special classes or home instruction, depending upon the circumstances of the children. The word "may" as used in the statute denotes a permissive or directory application rather than being mandatory insofar as the school districts furnishing instruction are concerned.

In applying the rules of statutory construction, the use of the term "may" in a statute in its ordinary sense means that which is permissive or directory and not mandatory. State ex rel. Coleman v. Blair, 151 S.W. 148, 245 Mo. 680; Lansdown v. Faris, C.C.A. Mo., 66 Fed. (2d) 939; Volume 26, Words and Phrases, Perm. Ed., page 774, et seq. In the case of State v. Morgan, 112 So. 865, 147 Miss. 121, there was involved a statute authorizing county school boards in certain occasions to create rural school districts. The word "may" was used in the statute relating to the school board exercising its authority, and the court held that it was used in a discretionary and not a mandatory sense and that where the school board refused to create a rural district it could not be compelled to do so by mandamus.

Honorable George A. Spencer

However, in considering the question at hand it is a primary duty to ascertain and give effect to the lawmaker's intent. *Kansas City v. J. I. Case Threshing Machine Co.*, 87 S.W. (2d) 195, 337 Mo. 913; *Weyering v. Miller*, 51 S.W. (2d) 65, 330 Mo. 885; *Union Electric Company v. Morris* (Sup.), 222 S.W. (2d) 767. We further should construe all statutes together which are applicable to the subject involved and harmonize them. *State v. Naylor*, 40 S.W. (2d) 1079, 328 Mo. 335.

With these rules in mind attention is directed to Section 10355, Laws of Missouri, 1947, Vol. II, page 385, which, with Section 10351, supra, and other sections, was enacted by the passage of Senate Committee Substitute for House Bill No. 126, referred to in your letter. Section 10355 provides:

"School districts shall establish special classes when there are ten or more children, who are so retarded as to be incapable of receiving proper benefit from the instruction in the regular grades, and shall receive state aid as provided in Section 10353." (Emphasis ours.)

It appears that the language of the above statute is mandatory in its meaning, for the use of the word "shall" in its ordinary sense indicates a mandatory statute. *State ex rel. Stevens v. Wurdeman*, 246 S.W. 189, 295 Mo. 566.

Section 10355 in its reference to children who are to benefit from its provisions names those "who are so retarded as to be incapable of receiving proper benefit from the instruction in the regular grades," and we believe that its application would be directed to those types of defective children named in the other sections of the act who are physically or mentally retarded.

It is apparent in reading the sections herein cited, as well as the others contained in Senate Committee Substitute for House Bill No. 126, Laws of Missouri, 1947, Vol. II, pages 383, et seq., that the Legislature has recognized the problem of providing educational instruction for defective children.

It is therefore our view of the matter that the Legislature has left the education of certain defective children within the discretion of the school district wherein such children are

Honorable George A. Spencer

found, but with definite limitations. And, where within a school district there are found ten or more children who are so retarded as to be incapable of receiving benefit from the instruction given in the regular grades but are able to attend special classes, then such district shall establish special classes for the purpose of instructing such children. The Legislature has further recognized the financial burden that would be incurred by school districts in providing special classes for defective children and has therefore provided state aid for such districts in the manner set out in Section 10353 of the act.

In view of the foregoing it is our thought that the education of crippled children now in the institutions to which you refer in your letter would fall within the provisions of the act herein cited and contained in the Laws of Missouri, 1947, Vol. II, pages 383, et seq.

CONCLUSION.

In the premises, it is the opinion of this office that the Division of Health of the Department of Public Health and Welfare is authorized to provide for the teaching and training of children who are resident patients confined in the Missouri Tuberculosis Sanatorium at Mt. Vernon by employing certified teachers and instructors and providing the necessary equipment, the cost of which to be paid out of moneys appropriated for that purpose. It is our further opinion that if there are ten or more crippled children in the hospital at Columbia and in the Blosser Home at Marshall who are able to attend special classes yet are incapable of receiving proper benefit from the instruction in the regular grades, then the school districts in which such children are found shall establish special classes for the instruction of such children.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

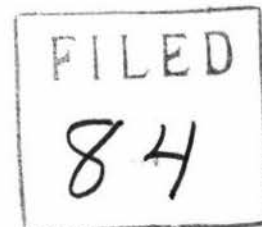
J. E. TAYLOR
Attorney General

RFT:ml

ELECTIONS:

Alien wife of United States citizen not entitled to vote when not naturalized.

August 21, 1950



Honorable George A. Spencer
517 Guitar Building
Columbia, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I presume that you have an opinion in the file on a question that I have had presented to me, but would like an opinion on the matter regardless of that and would like to have it some time in the near future.

"The problem is one of the right of a woman to vote who was a native Australian and who met a G.I. and she later came to this country and to Missouri and married this veteran in Missouri. Would she be entitled to vote in our elections?

"There is no question but what the husband can vote. In other words would her marriage to a qualified voter entitle her to vote? She has not taken out any citizenship papers.

"Would it make any difference if under the same circumstances they had been married in Australia and later came back to the home and residence of her husband?"

Section 2 of Article VIII, Constitution of Missouri, 1945, provides in part as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and

Honorable George A. Spencer

no other person, shall be entitled to vote
at all elections by the people; * * *

(Underscoring ours.)

The law regarding the acquisition of citizenship upon the marriage of an alien to an American citizen is stated in the case of *People v. Board of Elections*, 51 N.Y.S. 2d 216, at l. c. 219, as follows:

"The alien wife of an American citizen would acquire American citizenship if she was married to the citizen, after March 2, 1907, and prior to September 22, 1922. If her husband were a native born, citizenship would be acquired upon the marriage. If the husband were naturalized, the wife's citizenship would be derived from his naturalization. *U. S. v. Kellar*, C.C., 13 F. 82; *Kelly v. Owen*, 7 Wall. 496, 19 L. Ed. 283. The Act of Congress of 1922, 42 Stat. 1022 was amended July 3, 1930, 46 Stat. 854, March 3, 1931, 46 Stat. 1511, and May 24, 1934, 48 Stat. 797. Upon the amendments citizenship was not acquired by marriage, but if the alien spouse were eligible, he or she could be naturalized upon full compliance with the naturalization laws, but with no declaration of intention, and only three years residence prior to filing the petition."

Inasmuch as the Missouri Constitution requires that a person be a citizen of the United States in order to be eligible to vote, the mere fact of marriage to a citizen of the United States and a resident of Missouri would not entitle an alien to vote in Missouri inasmuch as she does not by reason of such marriage acquired a United States citizenship. The situation is the same regardless of the place where the marriage occurred.

CONCLUSION

Therefore, it is the opinion of this department that an alien who marries a citizen of the United States and a resident of Missouri is not thereby entitled to vote in Missouri elections inasmuch as such marriage does not confer United States citizenship upon the alien wife.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

ROBERT R. WELBORN
Assistant Attorney General

AGRICULTURE:
LICENSE FEES OF
DAIRY PRODUCTS PLANT:

Dairy products manufacturing plant must pay an annual license fee based upon the annual butterfat purchased regardless of where the butterfat is purchased.

October 16, 1950



10/17/50

Mr. Joseph T. Stakes
Director, Dairy Division
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion by this department upon the following question.

"Section 14114, Paragraph "b" of the Missouri Dairy Law establishes the amount that a dairy products manufacturing plant must pay for a dairy products manufacturing plant licensed based upon the volume of butterfat purchased during the calendar year.

"An opinion is requested relative to whether or not the butterfat purchased in the State of Missouri determines the fee required. * * *

Section 14114, R. S. Mo. 1939, as reenacted by Laws 1945, page 83, provides in part as follows:

"It shall be unlawful for any person to operate a dairy products manufacturing plant, or a cream station, within this state, unless licensed under the provisions of this law. Each license issued under this law must be conspicuously posted in the place of business to which it applies."

* * * * *

"(b) Each dairy products manufacturing plant operating in this state shall apply, under oath, for and obtain a dairy products manufacturing plant license for the license year, which license shall include the right to buy milk and cream. A dairy products manufacturing plant license shall be issued upon satisfactory application to the Commissioner, accompanied by an annual

Mr. Joseph T. Stakes

license fee based upon the annual butterfat purchases made during the last previous twelve months ending on June 30th, as follows: For any plant purchasing less than two hundred thousand (200,000) pounds of butterfat, ten (\$10.00) dollars; for any plant purchasing two hundred thousand (200,000) pounds and less than four hundred thousand (400,000) pounds of butterfat, fifteen (\$15.00) dollars; for any plant purchasing four hundred thousand (400,000) pounds and less than six hundred thousand (600,000) pounds of butterfat, twenty (\$20.00) dollars; for any plant purchasing six hundred thousand (600,000) pounds or more of butterfat, twenty-five (\$25.00) dollars; for a new plant, the business of which has not started sufficiently to establish a volume basis, the license fee shall be ten (\$10.00) dollars. It is further provided that the Commissioner or his agent, shall have the authority to examine the buying records of any such plant for verification of the butterfat tonnage purchased at such plant, at any reasonable time that the Commissioner shall elect to make such examination. A dairy products manufacturing plant license shall not be transferrable and shall not be movable from one city or town to another city or town, but, with the consent of the Commissioner, may be moved from one location to another location in the same city or town."

Section 14106, R.S. Mo. 1939, as reenacted Laws 1945, page 83, provides as follows:

"Each person engaged in the purchase and sale of milk and cream shall keep in proper books true and full records for a period of one year after the date of purchase of all such milk or cream purchases, tests and weights thereof, the dates when bought, received and shipped, including the grades of cream stored or handled the amount paid therefor and to whom. The records shall also include the dates and sales of such milk and cream, to whom sold, and the sums received therefor. These records shall, upon request, be made available at any time during business hours for the official information of the Commissioner."

The records that the purchasers of cream and milk must keep do not provide for a record of the place where such dairy products are purchased. Said section 14114 does not provide that the amount of the license fee shall be based upon the amount of butterfat purchased within the state of Missouri. The license fee to be charged the dairy products manufacturing plant is based upon the total amount of


Mr. Joseph T. Stakes

butterfat purchased during the last previous twelve months ending on June 30, regardless of where the butterfat is purchased. If the dairy products plant is located and operating in this state then their annual license fee will be based upon the total amount of butterfat purchased by such plant regardless of where the butterfat was produced or purchased.

CONCLUSION

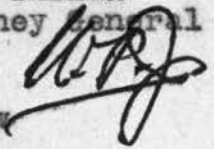
It is the conclusion of this department that the annual license fee of a dairy products manufacturing plant located and operating in this state shall be based upon the total amount of butterfat purchased during the last previous twelve months ending on June 30th, regardless of where the butterfat is produced or purchased.

Respectfully submitted,


STEPHEN J. MELLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General


SJM:mw

AGRICULTURE: Creamery indemnifying station operator
for loss sustained by purchase of unlawful
cream does not violate Missouri Dairy Law.

December 14, 1950

12/28/50

Mr. Joseph T. Stakes
Director of Dairy Division
Department of Agriculture
Jefferson City, Missouri

FILED

85

Dear Sir:

Your letter at hand requesting an opinion of this
department, which, in part, reads:

"Cream buying stations and creameries
throughout the State condemn illegal
cream when offered to them for sale.
However, it is known that in some in-
stances the cream is condemned or re-
jected and the creamery pays the cream
station operator for the losses in-
curred. As further clarification of
this point, the cream station operator
generally uses his own money in buying
the cream from the producer. He then
offers this cream for sale to the
creamery with whom he has established
contractual relationship. Therefore,
any cream offered for sale at the
creamery level is the property of the
cream station operator.

"An opinion is requested as to whether
or not it is a violation of the provi-
sions of the Missouri Dairy Law for a
creamery to pay the operator for losses
incurred by reason of cream offered for
sale having been condemned, rejected or
destroyed. It is felt that if the cream
station operator is reimbursed for such
losses, he will be inclined to accept
cream of questionable quality from pro-
ducers and thereby the purpose and intent

Mr. Joseph T. Stakes

of the Missouri Dairy Law will be defeated. It is further pointed out that the creamery by such practices might encourage the cream station operator to purchase illegal cream by guaranteeing him against losses which might be involved. Such a practice also places cream station operators who are not reimbursed for such losses at a competitive disadvantage with regard a local cream station operator who is reimbursed for illegal cream which he purchases and offers for sale to the creamery."

The question which you have submitted is whether or not it is an unlawful practice under the Missouri Dairy Law for a creamery to indemnify or reimburse a cream station operator for losses incurred by him due to cream he has purchased from a producer being condemned, rejected or destroyed. In other words, said cream would be considered "unlawful cream."

Section 14098, Laws of Missouri, 1945, page 83, Subsection 32(e), defines the term "unlawful cream" as follows:

"'Unlawful cream' is cream which contains or has contained dirt, oil, or other foreign or extraneous matter that renders it unfit for human consumption, or that is stale, cheesy, rancid, putrid, or is decomposed. Unlawful cream is hereby declared to be injurious to the public health, and immediately upon its examination and discovery by any licensee hereunder, the title thereto shall immediately vest in the Commissioner for the purpose of effectively removing it from the possible use in human food. Such unlawful cream is hereby declared to be contraband, and may be seized by an agent of the Commissioner, or any A or C licensee hereunder."

The above statute further provides that upon examination and discovery of unlawful cream the title thereto shall immediately vest in the Commissioner of Agriculture.

Section 14113, Laws of Missouri, 1945, page 83, provides as follows:

Mr. Joseph T. Stakes

"It shall be unlawful to buy or sell or offer or expose for sale anywhere in this state any dairy product containing any foreign substance or preservative of any kind whatsoever, not authorized by this law, or to buy or sell or offer for sale or deliver to another, for domestic or palatable use or to be converted into any product for human food, any unclean, impure, adulterated or unwholesome milk or cream."

In reading the above section it appears that the buying or selling, offering or exposing for sale, of unclean, impure, adulterated or unwholesome cream for human food is prohibited.

By the indemnifying arrangement between the cream station operator and the creamery, as you have set out in your letter, it does not appear that any of the condemned cream received by the operator is to be sold, offered for sale or delivered to any other person for domestic use or human food. As we understand the facts, the creamery merely indemnifies the cream station operator for a loss which he has sustained in the purchase of impure or unlawful cream from a producer and there is no actual sale of said cream to the creamery. Such being the case, it is our thought that the indemnifying arrangement existing between the cream station operator and the creamery does not fall within the prohibitions provided for in Section 14113, supra, nor do we find any other statute within the Missouri Dairy Law which would prohibit such practice.

While we can foresee that under such an arrangement as you have described a cream station operator would tend to be less cautious in purchasing cream from a producer, but as long as all of the cream which an operator purchases is properly inspected before it is made available for human consumption, it would seem that the public is protected, which is the principal function of the Missouri Dairy Law.

CONCLUSION

It is therefore the opinion of this department that a creamery indemnifying or reimbursing a cream station operator for loss sustained by the operator's purchase of unlawful

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cream which is subsequently condemned, rejected or destroyed,
is not in violation of any provision of the Missouri Dairy
Law.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RFT:ml

NOTARY PUBLIC) Commission cannot be dated back. No criminal
) liability for acting after expiration of commission.

January 27, 1950

2/2/50

Honorable Christian F. Stipp
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I respectfully request the opinion of your office on a question arising from the following stated facts. On January 30, 1945 a person was issued a commission as Notary Public and he duly qualified for such office. Through error and mistake this Notary Public began taking acknowledgments with the notation 'my commission expires January 30, 1950'. Actually, the commission expired January 30, 1949. Sometime prior to January 30, 1950, the Notary Public started to make application for a new commission and discovered that his old commission expired nearly a year before. During the period from January 30, 1949 to January 30, 1950 he took several acknowledgments. The questions are as follows:

- "1. Can he be issued a commission as Notary Public effective January 30, 1949?
- "2. Has any criminal statute been violated?
- "3. Should said Notary Public make application for a new commission effective whenever the same is issued?"

As far your first and third questions, Section 13360, R. S. Missouri, 1939, provides for the appointment and commission of

Honorable Christian F. Stipp

Notaries Public. There is no provision in this statute whereby a commission may be issued and dated as of a date prior to its actual issuance. Therefore, there would be no authority to issue the Notary Public, about whom you inquire, a commission effective January 30, 1949. A new commission would necessary be effective from and after the date of its issuance.

As for your second question, there is no criminal statute expressly covering the conduct involved in this situation. No provision is made in the statutes relative to the appointment and powers of Notaries Public to their criminal liability for reciting an erroneous date for the expiration of a commission or for acting as a Notary after the expiration of a commission. Section 4585, R. S. Missouri, 1939, deals with affixing false jurats, but there is nothing in that section which would cover this situation.

A provision possibly applicable is Section 4347, R. S. Missouri, 1939, which provides, "If any person shall take upon himself any office or public trust in this state, and exercise any power to do any act appertaining to such office or trust, without a lawful appointment or deputation, he shall, upon conviction, be adjudged guilty of a misdemeanor."

There have been no cases in this state construing this provision. Similar provisions in statutes of other states have, however, been construed to require willful usurpation in order to constitute an offense.

In the case of Grebe et al. v. State, 202 N.W. 909, and Kreidler v. State, 24 Ohio St. 22, the court held that assumption of office to constitute usurpation within the meaning of such statute must be such action as imports a willful usurpation of an office. In the case which you have submitted, there would not appear to be any willful usurpation on the part of the Notary Public. He simply was in error concerning the date of the expiration of his commission.

We find no other statutes imposing criminal liability which might be applicable in this situation.

CONCLUSION

Therefore, it is the opinion of this department that when a Notary Public, because of error in computing the date of expiration of his commission, erroneously states in his certificates that his

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commission expires a year later than the date of its actual expiration, and continues to act as a Notary Public during such period following expiration of his commission, he cannot obtain a commission dated back to the date of the expiration of his original commission but must obtain a new commission effective upon the date of its issuance.

We are further of the opinion that no criminal liability is imposed upon the Notary Public by reason of either his erroneous statement of the date of the expiration of his commission, or by reason of his continuing to act as a Notary Public following the date of the expiration of his commission, where such conduct on his part is not willful.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General



RRW/feh

SHERIFFS

PROBATE COURT

Oral direction to sheriff by probate judge sufficient to enable sheriff to charge fee for attendance at probate court.

June 7, 1950

Honorable Christian F. Stipp
Prosecuting Attorney
Carroll County
Carrollton, Missouri

FILED

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Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I have a copy of opinion dated January 3, 1947, by Mr. Pershing Wilson, to John A. Eversole with reference to Sheriff's fees for Court attendance.

"Your opinion is respectfully requested upon the following:

"1. Is an oral direction by the Probate Judge to the Sheriff sufficient to authorize him to charge the sum of \$3.00 per day when he actually attends?

"2. If the oral direction is not sufficient, may the Sheriff collect his fees if the daily record of the Probate Court shows him in attendance?

"3. Is it necessary that the Court direct the Sheriff each day to attend, assuming that the Court desires the attendance of the Sheriff?"

Section 13411, R. S. Missouri, 1939, provides in part:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the

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number of such deputies not to exceed
three per day.....\$3.00"

Section 2034, Laws of 1945, page 805, provides:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Section 476.26, Senate Bill No. 1138, Sixty-fifth General Assembly, which superseded Section 2035, R. S. Missouri, 1939, provides, "The court shall audit and adjust the accounts of the sheriff or other officer attending it and certify the same for payment."

The opinion dated January 3, 1947, by Mr. Pershing Wilson to John A. Eversole referred to in your letter concluded that the sheriff may retain the Three Dollar Fee provided for in Section 13411, R. S. Missouri, 1939, for attendance upon the circuit, probate and magistrate courts, if his attendance has been requested by the judge of said courts.

Section 2034, quoted above, makes no requirement concerning the form of the direction of the judge to the sheriff for his attendance at the court. There being no requirement that the direction be in writing, we feel that an oral direction is sufficient to justify the sheriff's attendance and permit the collection of the fee provided.

There is also no requirement that a new direction be given the sheriff each day. Therefore, we see no necessity for other than a general direction on the part of the judge that the sheriff attend his court.

Section 476.26, quoted above, makes it the duty of the court to audit and adjust the accounts of the sheriff, and this provision affords sufficient protection to the county so that there would be no necessity of any written record of direction on the part of the judge to the sheriff. The courts have held that the allowance by the judge is final. (State ex rel. v. Smith, 5 Mo. App. 427.)

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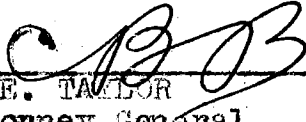
CONCLUSION

Therefore, it is the opinion of this department that an oral direction by the probate judge to the sheriff is sufficient to authorize the sheriff to charge the sum of Three Dollars per day when he actually attends the probate court, and that it is not necessary that the court direct the sheriff each day to attend.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh

DEPARTMENT OF AGRICULTURE: Vegetable or animal fats may not
DAIRY PRODUCTS: be added to ice cream.

July 20, 1950

8/30/50

Hon. Joseph T. Stakes
Director of Dairy Division
Department of Agriculture
Jefferson City, Missouri



Dear Mr. Stakes:

We are in receipt of your recent request for an opinion,
which reads in part as follows:

"The Missouri Ice Cream Law, which we understood was written in 1919, gives a comparatively low percentage of milk fat. The majority of the ice cream manufactured in this State is 12% butterfat or above. If under this Law it would be possible to use vegetable and animal fats in ice cream, the manufacturer would see to it that the product contained a minimum of 8% milk fat and build that product to perhaps a 12, 14 or 16% fat content with the addition of vegetable or animal fats. This practice would be most detrimental to the ice cream industry in this State and inasmuch as the detection of foreign fats in ice cream by taste is practically impossible, the consumer would be lead to believe that the ice cream contained a high percentage of milk fat. The point on which we would like an opinion is whether or not it would be permissible to use vegetable and animal fats in ice cream regardless of whether or not the use of these fats is stated on the label of the package."

Ice cream is defined by Section 14133, R. S. Mo. 1939 as follows:

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"Ice cream is a dairy product and a frozen mixture made of milk and cream or the products thereof; with sugar, stiffeners, flavors or extracts, and with or without certified coloring and containing not less than eight per cent milk fat. Ice cream, as in this section defined, and the various ingredients thereof, shall be free from filth, manure or other harmful or disease-bearing germs, or any element, ingredient or constituent deleterious to health. The manufacture or sale in this state of ice cream having a milk fat content less than required by this article, or containing any filth, manure or other harmful or disease-bearing germs, or any element, ingredient or constituent deleterious to health, shall be unlawful."

Section 14140, R. S. Mo. 1939, reads:

"It shall be unlawful for any person, firm, copartnership, association or corporation to whom or to which this article applies, to manufacture, sell or offer for sale in this state any frozen mixture, as or for, ice cream which does not conform to the standard prescribed in section 14133 of this article."

Therefore, a frozen mixture cannot be manufactured, sold or offered for sale as, or for, ice cream if such does not conform to the standard prescribed in Section 14133. It is our opinion that this standard is that product as defined in Section 14133, "a frozen mixture made of milk and cream or the products thereof; with sugar, stiffeners, flavors or extracts, and with or without certified coloring and containing not less than eight per cent milk fat." The question is whether or not vegetable or animal fats may be added to ice cream and the resulting product still conform to Section 14133.

Ice cream is a frozen mixture of "milk and cream or the products thereof", together with certain other permissible

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ingredients. Filled milk, which is milk or cream in its various forms to which fats or oils other than milk fat are added (Section 14062, R.S. Mo. 1939), is not included herein.

Nor is vegetable or animal fats among the other ingredients of ice cream, "sugar, stiffeners, flavors or extracts, with or without certified coloring," and furthermore it is specifically mentioned that ice cream shall contain "not less than eight per cent milk fat." Therefore, since vegetable and animal fats are not included among the ingredients which section 14133 declares shall constitute ice cream, the manufacturing, sale or offering for sale of a frozen mixture containing such as, -or for, ice cream would be unlawful under the provisions of Section 14140.


CONCLUSION

It is, therefore, the opinion of this department that a frozen mixture to which has been added vegetable or animal fats does not conform to Section 14133, R. S. Mo. 1939, which defines ice cream, and therefore cannot be manufactured, sold or offered for sale as, or for, ice cream.

Respectfully submitted

RICHARD H. VOSS
Assistant Attorney General

APPROVED:


J. E. TAYLOR
ATTORNEY GENERAL

RHV:A

TRANSPORTATION OF BUILDINGS
OR EQUIPMENT OVER STATE
HIGHWAYS BY MOTOR VEHICLES;
SPECIAL PERMITS REQUIRED,
WHEN.

) Transportation of building by motor
) vehicle under Secs. 8599-8604, Mo. R.S.A.,
) also requires special permit from Chief
) Engineer of St. Highway Dept. under Sec.
) 304.13, Senate Bill No. 1113. Transporta-
) tion of equipment of contractor by motor
) vehicle requires such special permit.

November 13, 1950

11-14-50

Honorable Christian F. Stipp
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which request reads as follows:

"Reference is made to Sections 8599, 8600-1-2-3-4-5 R. S. Mo. 1939. Further reference is made to Section 8405 R. S. Mo. 1939.

"Let us assume that a resident of Carroll County desires to transport, on a motor vehicle, a hen house 25 feet square, over the public highways of this State. Let us assume further that he has complied with the provisions of sections 8599-8605 R. S. Mo. 1939; the question is:

"Is it necessary for him to obtain a permit from the State Highway Commission, as provided in Section 8405, R. S. Mo. 1939?"

"The second question is:

"If it is necessary for him to obtain a permit from the State Highway Commission as provided in Section 8405, is it also necessary for him to obtain a permit from the County Clerk as provided in Sections 8599-8605?"

"Let us further assume that a contractor desires to move a dirt moving machine over

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a public highway of this state and that such movement will require the moving of electric transmission lines. The question then is from whom is he required to obtain a permit."

Sections 8599 to 8605, Mo. R.S.A., outline the necessary procedure to be followed in obtaining a permit to move a house, building or other structure upon or across any public highway, outside the limits of cities of certain classes. Section 8599 reads as follows:

"No person, firm or corporation shall move, haul or transport any house, building or other structure upon, across or over any public highway outside of the limits of any city of the first, second or third class, or any city existing under a scheme and charter or a special charter in the state of Missouri, without first obtaining a permit therefor, as hereinafter provided: Provided, that nothing herein shall apply to a city having a population of 15,000 or less."

Section 8600, Mo. R.S.A., provides for making the application to the county clerk of the county in which the property is located. Sections 8601, 8602, 8603 and 8604 provide other necessary steps in such procedure before the permit may be issued. Since we are not here particularly concerned with such procedure, we merely mention said sections in passing.

The facts given in the opinion request are very meager and no information is given as to whether the building to be moved is located outside the limits of one of the cities of those classes mentioned in Section 8599, but since the writer continues, "Let us assume further that he has complied with the provisions of Sections 8599-8605, R. S. Mo. 1939," we take it that the building to be moved is located in Carroll County outside the limits of one of the cities referred to in Section 8599, and that the person desiring to do the moving now has, or will receive, the permit from the county clerk of such county.

From the wording used in Section 8599, it appears to have been the intention of the Legislature to enact a general statute authorizing any person, firm or corporation to move, haul or transport any house, building or other structure upon, over or across any public highway outside the limits of certain classes of cities therein provided, and to require one seeking to move any such building or structure over any such highway to first obtain a permit authorizing him to move or transport such building or structure.

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Such permission to move a building or other structure makes an act legal which, without the permission, would be illegal, subjecting one to prosecution under the criminal laws of the state for obstruction of a public highway. The permit is a grant to move the building described and nothing more. It does not, nor do any of the other sections of the statute referred to in the opinion request, go into detail as to how the building shall be moved. For example, no provision is made that the building shall be moved or transported only by a motor vehicle of a certain horsepower or tonnage. The details, the methods or the motive power to be used is not specified in such statutes, and it appears that such matters have been left to the discretion of the person in charge of the actual moving operations. It is therefore our thought that one who possesses a permit issued under authority of the above sections to move a certain building may employ whatever motive power he so desires, having due consideration for the safety of other persons, vehicles and property upon the highway at the time the moving operations are in progress.

Further inquiry is made as to whether such person is required to obtain a permit from the State Highway Commission under the provisions of Section 8405, R. S. Mo. 1939, which we interpret to mean in addition to the permit obtained or to be obtained from the County Clerk of Carroll County.

Section 8405, R. S. Mo. 1939, has been repealed and Section 304.10, Senate Bill No. 1113, has been enacted in lieu thereof and reads as follows:

"1. No motor drawn or propelled vehicle shall be operated on the highways of this state the width of which, including load, is greater than ninety-six inches (except clearance lights, rear view mirrors, or other accessories required by a Federal, state, or city law or regulation); or the height of which, including load, is greater than twelve and one-half feet, or the length of which, including load, is greater than thirty-five feet; and no combination of such vehicles coupled together of a total or combined length, including coupling, in excess of forty-five feet shall be operated on said highways.

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"2. These restrictions shall not apply to agricultural implements operated occasionally on the highways for short distances, or to vehicles temporarily transporting agricultural implements or road making machinery, or road materials, or towing for repair purposes cars that have become disabled upon the highways."

Also Section 304.13 of Senate Bill No. 1113 provides under what circumstances the chief engineer of the State Highway Department may issue special permits for the temporary use of over-dimensioned motor drawn or propelled vehicles on the highways of the state, and reads as follows:

"1. The chief engineer of the state highway department, whenever in his opinion the public safety or public interest so justifies, may issue special permits for vehicles exceeding the limitations on width, length, height and weight herein specified. Such permits shall be issued only for a single trip or for a definite period, not beyond the date of expiration of the vehicle registration and shall designate the highways and bridges which may be used under the authority of such permit."

This is a special rather than a general statute since it applies only to vehicles of a certain type and regulates the width, height and length of all such motor drawn or propelled vehicles operated on the highways of the state. It further provides that no vehicle of this classification shall be operated upon the public highways without a due compliance with this section of the statute.

The resident of Carroll County referred to in the opinion request desiring to transport the hen house over the public highways of the state chose to use a motor vehicle in transporting such building and the description given of the motor vehicle is such that it comes within the classification of motor drawn or propelled vehicles referred to in Section 304.10, Senate Bill No. 1113. Therefore, the regulations as to width, height and length are fully applicable to the motor vehicle to be used in transporting the hen house, since said vehicle does not fall within that class of vehicles to which the exception is provided in said section.

While the above-mentioned regulations apply to all motor drawn or propelled vehicles not excepted therefrom and prohibits the operation of same on the highways of the state, yet it is noted

Honorable Christian F. Stipp

that such motor drawn or motor propelled vehicles may be operated on the state highways when the dimensions of such vehicles exceed those provided in said section, and that under certain circumstances the Chief Engineer of the State Highway Department may issue special permits for the temporary operation of such vehicles, under the terms of Section 304.10, supra.

The regulations as to the dimensions of the motor vehicles that may be operated over the state highways, and the power of the Chief Engineer of the State Highway Department to issue special permits for the temporary use of motor vehicles over such highways, where the dimensions of those vehicles exceed the limits provided by this section, is not unreasonable or a discriminatory law, nor does it vest authority in the Chief Engineer to exercise great power in an arbitrary manner over certain persons or their property. Rather it appears that the law is very reasonable, and that the Chief Engineer is only performing his duty as a public official in granting such special permits and enforcing the laws of the state pertaining to the use of motor vehicles upon the public highways of the state. It has long been the law in Missouri that the state has the power to supervise and control the movement of traffic over its highways, and in this connection we desire to call attention to the following cases which we believe fully sustains our contention.

In the case of Park Transportation Co., v. State Highway Commission, 332 Mo. 592, 1. c. 599, the court said:

"The State has the right to regulate and control the movements of motor vehicles over its highways, and may exercise it in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. * * *"

Also in the case of Schwartzman Service, Inc. v. Stahl, 60 F. (2d) 1034, at 1. c. 1037, the court said:

"The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them. * * *

"Assuming, therefore, the power and right of the state to regulate and supervise its highways, such right cannot be hampered or restricted within narrow bounds. On the contrary, to the end that such right might

Honorable Christian F. Stipp

be fully enjoyed and exercised, there is a constant recognition of the principle that the state 'has a broad discretion in classification in the exercise of its power of regulation.' * * * Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary."

Therefore, in answer to your first inquiry, it is our thought that the provisions of Section 304.10, Senate Bill No. 1113, supra, are such that it is mandatory upon the party referred to in the opinion request to secure a special permit from the Chief Engineer of the State Highway Department authorizing the use of an over-dimensioned motor drawn vehicle for moving the building referred to.

For reasons noted above, Section 8599 is a general statute, providing for the issuing of a permit to move a building over, across or upon any public highway of the state, and sections immediately following outline the procedure for obtaining that permit.

Also for reasons noted above, Section 304.10, Senate Bill No. 1113, is a special statute regulating the dimensions of all motor drawn or propelled vehicles that may operate over the state highways, and Section 304.13, supra, is also a special statute that provides for the issuing of special permits under certain circumstances by the Chief Engineer of the State Highway Department where the dimensions of such vehicles exceed the provisions of Section 304.10.

It is our further thought that there is no conflict between Section 8599, supra, and Section 304.10, Senate Bill No. 1113, but that such statutes must be read together and that both of them are to be given effect, and that they are to be harmonized.

In answer to your second inquiry, it is our thought that in the instance given and for reasons stated above, it will be necessary for the citizen of Carroll County to secure the special permit from the Chief Engineer of the State Highway Department as provided by Section 304.13, Senate Bill No. 1113. That in such instance it will also be necessary to secure the permit from the County Clerk of Carroll County, as provided by Sections 8599 to 8605, before attempting to move or transport the building mentioned over the public highways of the state.

The third inquiry is from whom a contractor, who desires to move dirt moving equipment over a public highway, where such transportation

Honorable Christian F. Stipp

will require the moving of electric transmission lines, will be required to obtain a permit authorizing him to transport such equipment.

The facts given do not indicate whether the dirt moving equipment is to be transported by motor drawn or propelled vehicle, and if so, whether the dimensions of such vehicle will exceed the regulations as to width, height and length provided by Section 304.10, Senate Bill No. 1113, supra.

Assuming that the dirt moving equipment is to be transported by motor drawn or propelled vehicle, the dimensions of which well exceed those provided by Section 304.10, supra, it is our thought that it will be necessary for the contractor to secure a special permit from the Chief Engineer of the State Highway Department as provided by Section 304.13, supra. However, such a special permit would not authorize the contractor to move or in any manner to interfere with any electric transmission lines along the route travelled by his vehicles.

As previously noted Sections 8599-8604 outline the procedure for obtaining a permit to move a house, building, or other structure over or across a public highway, and applies only to the movement of those structures coming within the classification set out by Section 8599.

Sections 8601, 8602, under certain circumstances therein provided, authorize the cutting and removal of electric transmission, and other lines where such removal is necessary to the transportation of the building or structure over or across a public highway. These statutes are very restrictive in nature and will be construed strictly against any person, firm, or corporation seeking to invoke them as a defense for the cutting and removal of any lines or poles of the description mentioned, while transporting a house or other structure on or across a public highway.

In this connection we desire to call attention to the case of Southwestern Bell Telephone Company v. Drainage District No. 8, 215 Mo. App. Rep. 456, which involved the interpretation of certain sections of the statutes then in force, and very similar to those referred to above, namely, Sections 8599 to 8604 of the 1939 statutes. The court said at l. c. 458:

"The law is well settled that statutes which undertake to subject private property to a charge on account of a public use must be strictly construed. (See Heman Construction

Honorable Christian F. Stipp

Co. v. Lyon et al., 277 Mo. 628, 211 S.W. 68.) Giving to statutes relied on by defendants herein a strict construction, we find, first, that it is made to apply only to 'houses, buildings and other structures.' The words 'other structures' is ejusdem generis. A dredge boat could in no sense be termed a house or a building.
* * *

Applying the rule laid down in this case to the facts before us, it is our further thought that the dirt moving machine could not under the most strained interpretation, be classified as a house, building, or other structure, and particularly as an "other structure" within the meaning of Section 8599, and that the contractor, even though he had specified in his application for a permit under the provisions of Sections 8600 and 8601, that it would be necessary to have certain electric transmission lines, or poles, or such lines and poles located along a public highway over which his motor vehicle would travel while transporting a dirt moving machine removed, such facts would not be sufficient to authorize him to cut and remove any such electric transmission wires, or poles, or such electric transmission wires and poles.

CONCLUSION

It is the opinion of this department that a permit to transport a building over the public highways of the state as provided by Sections 8599 to 8604, Mo. R.S.A., inclusive, is sufficient authority for the transportation of the building by whatever means the holder of the permit may choose to employ in such transportation, having due regard for the rights and safety of persons and the property of others that may be upon the highway at the time the transportation of the building is in progress. However, where the holder of such a permit chooses to use a motor vehicle, the width, height and length of which, including load, shall exceed the limitation of the dimensions of motor drawn or propelled vehicles that may be operated upon the highways of the state, as provided by Section 304.13, Senate Bill No. 1113, and where said vehicle does not come within the classification of those vehicles specifically exempted from such limitations by said section, said motor vehicle may not be used to transport said building over the highways of the state unless the owner or operator thereof first secures a special permit from the Chief Engineer of the State Highway Department authorizing the use of such over-dimensioned

Honorable Christian F. Stipp


vehicle as provided by Section 8405, supra. Such special permit is to be in addition to the one authorized under Sections 8599 to 8604, supra.

It is the further opinion of this department that a contractor who desires to transport a dirt-moving machine over the highways of the state by means of a motor drawn or propelled vehicle, the width, height and length of which, including load, will exceed the limitation of the dimensions of such vehicle that may be operated over the highways of the state, as provided by Section 8405, supra, and that such vehicle does not come within the classification of those vehicles specifically exempted from such limitation by the further provisions of said section, that such motor vehicle may not be used to transport said dirt-moving machine until said contractor first obtains a special permit, from the Chief Engineer of the State Highway Department, as provided by Section 304.13, Senate Bill No. 1113, thereby authorizing the use of said vehicle over the public highways of the state. Such special permit will not authorize said contractor to move or in any manner to interfere with electric transmission lines located along the route over which he has been granted a special permit to operate the over-dimensioned motor vehicle.

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

SCHOOLS:

Member of school board cannot contract with school district as being in violation of the public policy of the state.

July 17, 1950

Honorable Homer L. Swenson
Prosecuting Attorney
Wright County
Mountain Grove, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads:

"In a certain consolidated school district in this County (Wright) the Board of Education consists of six members. Four of the directors are engaged in businesses as follows: Motor Car Dealer, Grocery Store, Oil & Gas and General Merchandise. The Motor Car dealer exercises the exclusive right to sell all the products that he offers for sale to the district as does the Groceryman, Oil & Gas dealer and General Merchant. This method of operation, to the exclusion of other merchants, has caused complaints to be made to me by reputable citizens and taxpayers of the above mentioned school district.

"This sort of thing presents a difficult problem to me and while I know that such conduct is not proper I have been unable to decide on what procedure to follow.

"I believe if I could present an opinion from your office as to the legality of the above mentioned practices that I could satisfy all concerned and eliminate this problem.

"Your opinion as to the legality of school directors using their positions for personal gain and also the procedure to follow in an effort to eliminate it is respectfully requested."

Honorable Homer L. Swenson

In your letter you inquire as to the legality of an arrangement whereby members of the board of directors of a school district are selling certain products and items of merchandise to the school district to the exclusion of other merchants.

Regarding the matter of a school director entering into a contract with the school district, we find the rule to be generally stated in Volume 47, Am. Jur., Section 49, page 330, as follows:

" * * * As a general rule, however, the confidential and fiduciary relation of a director to the district which he represents precludes him from placing himself in a position where his own personal interests may conflict with those of the school district. For this reason, it is generally held unlawful for a director to enter into a contract with the school district in which he has a personal and individual interest, or to continue after election as a director in a contract relation previously assumed; a contract so made by a director will not be enforceable. While the matter is usually regulated by statutes either abolishing or limiting the right to contract, the general rule, being based on public policy, may apply even in the absence of statute."

There further appears to be some statutory authority that would apply to the school district in question which would prohibit members of the school board from profiting through any contractual relation with the school district while they remain members of the board. Thus, Section 10501, R.S.A., in part, provides:

"No member of any public school board of a city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: * * *"

The law as expounded by the Supreme Court of Missouri has generally conformed to the above rule, in that the court has held that contracts between a school district and a member of its board of directors are against public policy.

In the case of Witmer v. Nichols, 8 S.W. (2d) 63, the court, in considering a factual situation wherein a member of the board

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of directors of a school district was instrumental in arranging for the sale of certain lands to the school district, said at l.c. 65:

" * * * But on either theory of fact the transactions, in so far as the school district was involved, contravened public policy. Nichols as a member of the board of directors owed the school district an undivided loyalty in the transaction of its business and in the protection of its interest; this duty he could not properly discharge in a matter in which his own personal interests were involved. The principle is so well settled that we do not deem it necessary to cite authorities."

In the case of Smith v. Hendricks, 136 S.W. (2d) 449, which was an action instituted by resident taxpayers of a school district to recover back money paid to a member of the school board for driving a school bus, the court held that the taxpayers, suffering no pecuniary damages, could not institute such an action. However, in considering the right of the state to bring such an action, the court said at l.c. 459:

" * * * If the State, as in the Weatherby case, were suing to recover the money unlawfully paid the respondent, it would undoubtedly have the right to do so even though it would result in obtaining the services of the respondent without compensation. This because the employment and the payment of respondent violated the public policy of the State, as plainly expressed in the statute. The fact that the district has suffered no loss, but has received services equal to the value of the money paid to the respondent, would constitute no defense in such an action. * * *"

In the case of Nodaway County v. Kidder, 129 S.W. (2d) 857, an action was instituted against one of the members of the county court to recover back money paid him by the county court under an alleged contract. At l.c. 861 the court again stated the general rule:

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. * * *"

Honorable Homer L. Swenson

In view of the foregoing authorities it would appear that the contracts entered into between the members of the school board and the school district, such as you have described in your letter, would be illegal as being in violation of law and the public policy of the state.

Regarding future action that might be taken, it is our thought that suit could be instituted against these individuals to recover back money illegally paid them under an invalid contract.

CONCLUSION

In the premises, it is the opinion of this department that members of the board of directors of a school district are precluded from contracting with the school district in such a manner as will result in their personal gain.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS: School board meetings to be valid must be called by the president of the board.

August 7, 1950

#267
8/25/50

Honorable Homer L. Swenson
Prosecuting Attorney
Wright County
Mountain Grove, Missouri



Dear Sir:

This will acknowledge your letter requesting an opinion on the validity of school board meetings which have not been called or attended by the president of the board. That portion of your letter setting forth the facts, in part, reads:

"A situation has arisen in Wright County in which the Directors of the common school district, other than the President of the Board, have called meetings of said Board without requesting the President to call said meetings, nor has the President refused to call any meetings.

"These meetings have been called and business has been transacted such as signing teachers contracts, signing and issuing of warrants, and other transactions. The President has not attended such meetings."

We note that the school district in question is a common school district.

Regarding the organization of the board of directors of a common school district and the holding of meetings, Section 10422, R.S. Mo. 1939, provides:

"The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter

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upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: Provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of a director."

We note in reading your letter that the employment of teachers or signing of teachers' contracts is a part of the business which has been transacted by the board members, other than the president. Section 10342, R.S. Mo. 1939, pertaining to all classes of schools, in part, provides:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. * * *"

Regarding school meetings, the rule is that they must be conducted in conformity with the requirements of the statutes. This would include the calling of the meeting, transacting business coming before the meeting and the keeping of minutes and records thereof.

In State v. Lawrence, 178 Mo. 350, the court, in construing a statute similar to Section 10422, supra, said at l.c. 373, 374:

"Section 9761, Revised Statutes 1899, provides as follows for the organization of the board and the transaction of business:

"The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the

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board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: Provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all meetings of the board.'

"It will thus be seen that the officials of the school district - a body corporate - must conduct the business of the district in an official way, as indicated by the statute.

"To have issued a school warrant, binding upon the district mentioned in this cause, for the purchase of the books sought to be purchased by it, the directors in such transaction would be required to meet as a board, with one of their number as clerk; who is required to keep a correct record of the business of such meeting; then, as a body, make the purchase, order the warrant drawn in conformity to the requirements of the statutes, all of which must be evidenced by the record of the meeting."

Concerning the calling of the meeting, the rule is stated in 56 C. J., Section 233, page 355, as follows:

"A school district meeting must be called and notice thereof given by the officers or persons authorized by law to do so; and the proceedings of a meeting called or warned by unauthorized officers or persons are invalid."

Certainly, as to the contracting for teachers, Section 10342, supra, seems to be clear in providing that the meeting wherein such

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contracts are executed must be called by the president of the school board, and we also believe that it is the power of the president to call special meetings of the school board, as well as to preside over them.

In the case of Johnson v. Dye, 142 Mo. App. 424, the court, in construing a statute with provisions similar to those of the quoted portion of Section 10342, supra, said at l.c. 427, 428:

"In regard to the meeting, the statute (sec. 9766) reads: 'The board shall have power at a regular or special meeting to contract with and employ legally qualified teachers for and in the name of the president, and each member notified of the time, place and purpose of the meeting.'

"It stands admitted that the president did not call the meeting, which it is claimed, was held at the home of the defendant on April 1. * * *

"If the statute is mandatory, then in as much as the president did not call this meeting and refused to attend it, it was irregular, and the plaintiff would not be entitled to recover, as a teacher cannot be legally employed except at a regular or special board meeting. (Pugh v. School District, 114 Mo. App. 688, 91 S.W. 471.)

"The statute authorizes a majority of the board to hire a teacher. This means that a majority acting at a legal meeting, and does not mean that directors acting separately, although a majority of the board, can make a binding contract. (Kane & Co. v. School District, 48 Mo. App. 408; Johnson v. School District, 67 Mo. 321.)

"It is the general rule that where the charter, statute, or by-law of a corporation, provides a method by which the notice shall be given of a special meeting, its provisions must be obeyed. * * *

"The statute expressly provides that special meetings shall be called by the president

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of the board. There is no authority for any other member to call a special meeting. It stands admitted in this case, that the president did not call the meeting at which it is claimed the two directors employed the teacher, and therefore, we are of the opinion that the meeting was not a legal one."

We find no statutory authority permitting members of the school board, other than the president, to call a meeting of said board, and the statutes above cited indicate that the president is the proper person to call said meetings.


CONCLUSION

In the premises, it is the opinion of this department that school board meetings of a common school district which have not been called by the president are invalid and are illegally convened to transact the business of the school district.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:



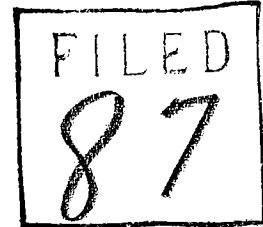
J. E. WILSON
Attorney General

RFT:ml

ELECTIONS--Expense account:

Expense statements required by Section 11790, R.S.Mo. 1939, must be filed by every candidate after both the primary and general elections. Such statement after a primary election may be filed later than 30 days thereafter, but within a reasonable time before the general election.

September 25, 1950



Honorable Homer L. Swenson
Prosecuting Attorney
Wright County
Mountain Grove, Missouri

FILED 87

Dear Mr. Swenson:

The following is the opinion requested in your recent letter to this department.

Your letter reads:

"In the primary election of August 1, 1950, there were several Democratic Candidates on the ballot, all unopposed, and of course nominated by default. As for myself I was a candidate for the nomination for Prosecuting Attorney. No expenses were incurred by any of us except the \$5.00 filing fee.

"I have received word that the County Clerk of this County plans to keep our names off of the general election ballots for the reason none of us have filed statements of expenditures in the said primary campaign, as required by Section 11790, R.S.Mo. 1939, within 30 days subsequent to the primary election.

"Section 11790 as I read it states that every person who shall be a Candidate before any caucus or convention or at any primary election or at any election for any State, County, City, Township, District or Municipal office etc., shall within 30 days after the election held to fill such office or place, make out

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and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the County in which such Candidate resides, a statement in writing * * * setting forth in detail all sums of money, * * * contributed, disbursed, expended or promised by him etc., * * *. No Officer authorized by law to issue Commission or Certificate of election shall issue a Commission or Certificate of election until such statement shall have been made, verified and filed by such persons with said Officer.

"Section 11792 provides that no person shall enter upon the duties of any elective office until he shall have filed the statement and duplicate provided for in Section 11790 of this Article, nor shall he receive any Salary or emolument for any period prior to the filing of the same.

"Speaking for myself and not for the other Candidates I have had the knowledge of the above Sections quoted and have always been of the opinion that the legislative intent in passing such a law was to prevent corrupt practices in election and not to disqualify persons elected to office on mere technicalities. Also the Courts have held these statutes to be strictly penal as to corrupt practices.

"Due to the fact that a primary election is not an election held to fill such office or place, but an election to decide who shall compete for such office or place in the general election, a Candidate is not required to file statement of expenditures until 30 days after the general election.

"Section 11792 bears out this contention as it even contemplates taking office and serving but takes away any salary or emolument until such statement is filed.

"Also nothing is mentioned about a late filing of such a statement, but it appears that it is not prohibited.

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"I desire an opinion in regard to the above, first, if it is proper to file after the general election only and not the primary, second, if filing is required after the primary if there is anything to prevent a late filing of such statement and third, if a County Clerk can refuse to certify names of Candidates to be placed on the general election ballot by reason of failure to file or a late filing of such statement.

"Your opinion is respectfully requested and would appreciate it very much if it can be sent to me at your earliest convenience."

You submit three questions:

1. Must the expense statement of a candidate be filed after both a primary and a general election;
2. If a statement must be filed after the primary election, may it be filed on a date later than thirty days after that election, and,
3. May a county clerk refuse to certify names of nominees of a political party, nominated at a primary election, by reason of their failure to file, or a later filing of, such statements.

Section 11790, R.S.Mo. 1939, reads as follows:

"Every person who shall be a candidate before any caucus or convention, or at any primary election, or at any election for any state, county, city, township, district or municipal office, or for senator or representative in the general assembly of Missouri, or for senator or representative in the congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in

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writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed, disbursed, expended or promised by him, and , to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other persons at said election, and showing the dates when and the persons to whom and the purposes for which all such sums were paid, expended or promised. Such statement shall also set forth that the same is as full and explicit as affiant is able to make it. No officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any such person until such statement shall have been so made, verified and filed by such persons with said officer."

The provisions of this section as to these particulars have never been before the Supreme Court of Missouri for construction. The courts of last resort of other States, however, which have statutes similar in their terms to those, including said Section 11790, of our Corrupt Practice Act, have passed upon such statutes, the construction of which arose out of the precise questions submitted to us here.

The two first questions in your letter, we believe, resolve themselves into the one, whether the filing of the expense statement following both the primary and the general elections required by said Section 11790 is mandatory or directory, and, if mandatory, is the statute mandatory or directory as to the time for filing the statement within thirty days after the primary election.

The third question submitted does not depend upon whether any of the provisions of Section 11790 are mandatory or directory. It involves entirely different principles of law and different facts.

Honorable Homer L. Swenson

The Corrupt Practice Act of the State of Kentucky contains one section very similar to our Section 11790 requiring the filing of an expense statement by every candidate before both a primary and a general election not later than the fifteenth day before the date of each of such elections in that State. The Kentucky statute was before the Court of Appeals of that State for construction, on like grounds to those before us, in the case of Sparkman, et al. vs. Saylor, 202 S.W. 649. The Court held the Kentucky Act requiring the statement to be filed before both elections was mandatory, but that the date upon which the pre-election statement is required to be filed is directory, and not mandatory. The opinion, upon a complete discussion of the Corrupt Practice Act of that State, and of the facts and issues as to the filing, and when the expense statement may be filed, so holding, 1.c. 650, 651, says:

"The purposes of the act are thus clearly stated in its title: 'An act to promote pure elections, primaries and conventions, and to prevent corrupt practice in the same; to limit the expenses of candidates; to prescribe the duties of candidates and providing penalties and remedies for violations, and declaring void, under certain conditions, elections in which these provisions or any of them have been violated'--which is conclusive, as is the act as a whole, of a legislative intent to insure fair and pure elections, free from corrupting influences, at which the voluntary choice of the majority or plurality of the qualified electors might be ascertained; and it, of course, was not the purpose of the act to defeat the free will of the majority or plurality after a fair election, free from corrupting influences, had been held; nor ought we to presume that the Legislature, in prescribing rules intended to accomplish its purposes, meant to sacrifice substance for mere forms. Unquestionably, the act is mandatory, in so far as it provides for the filing by all candidates of a true and accurate statement of expenses, covering every specified item, both before and after the election, because, until he does so, the successful candidate cannot get a certificate of election, qualify, or receive the emoluments of his office. And the legislative intent therefor was doubtless twofold: First, that voters, from an inspection of the pre-election

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statement which was required to be open to public inspection, might understand the influences being exerted on behalf of the several candidates; and, second, that an election might be annulled upon a contest under certain conditions which had been procured by corrupt practices, evidence of which would be disclosed or indicated by one or the other or both of the required statements. And it is quite apparent that the pre-election statement, in so far as it is intended to enlighten the voter, is reduced in value in proportion to the time its filing precedes the election, so long as time is allowed in which to give publicity to its contents throughout the district for which the election is held; and that, in an election for an office such as is involved here, a statement filed on the fifteenth day before the election could be of no additional practical value whatever, either to the voter in determining how he should vote, or to avoid the consequences of corruption upon the part of a successful candidate by contest instituted thereafter, over a statement filed a less number of days before the election, because in a magisterial district election corrupting influences would scarcely ever have been inaugurated that far in advance of the election, even where they were contemplated, and but a few days would suffice to give publicity to a statement throughout the district; while, in an election for a state office, such influences, if they are to be effective, might by that date have been manifested in part, at least, by such a statement, and a much longer time would be required for effective publicity than in a smaller district. Yet, the Legislature made the same provisions as to time of filing the statements with reference to all candidates, whether running in the whole state or in the smallest subdivision thereof. So, it seems to us the provision as to the time for filing the pre-election statement cannot be held to be mandatory upon any theory of the purposes intended to be accomplished thereby, and every reason exists for holding it directory merely in such respect if the terms of the act will permit, since, in the absence of corrupt practices, after a reasonable and substantial compliance with the

Honorable Homer L. Swenson

provisions of the act by the candidate, no reason whatever exists for denying to him the fruits of such a victory, nor to the voters the officer of their choice; and we are extremely reluctant to do so upon doubtful or less than clear and unmistakably authority.

* * * * *

"While the section of the statute now before us provides that the pre-election statement 'shall' be filed on the fifteenth day before the election, and while it is a general rule of construction that, when used in a statute, 'the words "shall" and "must" are imperative, operating to impose a duty which may be enforced' (36 Cyc. 1160) it is apparent from the authorities cited above that there are many exceptions to this general rule, depending upon the intention of the Legislature to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. In our judgment, upon such consideration of the statute, the word 'shall' as here used, is mandatory as to filing of the statement, but directory only as to the time when it shall be filed."

Our Supreme Court in numerous cases has defined the rules of construction to be applied whereby statutes, or parts of statutes, are to be held mandatory or directory, in matters relating to elections and other subjects, as cases have required. One of such cases is State ex rel. Ellis vs. Brown, Judge, 33 S.W.(2d) 104. The proceeding was one to test the right of a voter to appear for registration on a date later than that fixed by the amended Act of 1921, Laws of Missouri, 1921, page 351. The Court, l.c. 107, quoted the text in 25 R.C.L., Section 14, pp. 766, 767, as a rule by which a statute may be held to be mandatory, or directory, where the Court said:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the

Honorable Homer L. Swenson

consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R.C.L. sec. 14 pp. 766, 767.

"Said section 30 provides that qualified voters who were absent on the regular registration days may file applications in the office of the election commissioners to have their names registered; that such application shall be filed not later than the fourteenth day preceding said election; that the election commissioners shall sit specially to hear such applications on Monday, Tuesday, and Wednesday of the first week prior to the election; and that said applicants shall appear in person before the commissioners on one of said days. The statute does not prescribe the consequences of the failure of an applicant either to file his applications not later than the fourteenth day preceding the election or to appear before the election commissioners on Monday, Tuesday, or Wednesday of the first week prior to the election; it does not declare that a failure of an applicant in either of the two respects mentioned shall preclude his right to be registered. Now every person having the qualifications prescribed by the Constitution has the right to vote, and the sole objective of the statute is to determine the individuals who possess those qualifications and make a public record thereof. Such record when made, tends to prevent repeating,

Honorable Homer L. Swenson

colonization, and other fraudulent abuses of the franchise. The making of the record and the truthfulness of its recitals are the essence of the thing the statute requires to be done and not the time in which it is to be done, except that it be within the period between the election and the beginning of the sixth week preceding it. Sections 22 and 35. The board of election commissioners is required to maintain an office and keep it open during business hours of every day except Sundays and holidays. Section 3. It would seem, therefore, that the provisions with reference to the time for the filing of applications by absentees and for their hearing by the board were intended merely to promote the convenient and orderly dispatch of the public business."

Declaring that statute directory, as to the time of registering by the voter, the Court, l.c. 108, further said:

"For the reasons heretofore indicated, we are of the opinion that the provision of said section 30 that persons applying to be registered who were absent on the regular registration days shall appear before the board of election commissioners on one of the days therein designated is directory and not mandatory, * * * * *."

We stated hereinabove that this section has never been construed by our Supreme Court as to whether its provisions relating to the filing of the statement and when it is to be filed are mandatory or directory. That is true. The Supreme Court, however, commented upon the provisions of the section, requiring the expense account of a candidate to be filed, and held that, being penal, it should be strictly construed, in the case of *State ex inf. Burgess, Pros. Atty., ex rel. Hankins vs. Hodge*, 8 S.W. (2d) 881, where the Court, noting the section, then Section 5031, R.S.Mo. 1919, now Section 11790, R.S.Mo. 1939, l.c. 883, 884, said:

"* * * Our attention is directed only to that part of section 5031, R.S. 1919, which provides that, within 30 days after election, such statement shall be filed with the officer empowered by law to issue the certificate of election and a duplicate with the recorder of deeds; to section 5032, which provides for the assessment of a

Honorable Homer L. Swenson

fine in event of failure so to do; and to section 5033, which provides that no person shall enter upon the duties of any elective office until he shall have filed such statement and duplicate. It must be noted that none of these provisions state that such person shall forfeit title to his office by reason of failure to comply with this statute. This provision is a part of what is generally known as the Corrupt Practice Act. It is strictly penal in its nature, and should be strictly construed. Nothing should be regarded as included in it which is not clearly described in its very words. * * *."

The making and filing of the statement of expense is the very essence and substance of Section 11790 and of the whole Act. The section provides that every person who shall be a candidate "at the primary election," or at "any election for any office," shall file such statement "within thirty days after the election to fill such office or place."

We believe it is clear that the Legislature, by the choice of such words, intended that two statements, one after a primary election, or a convention, or a caucus, for the nomination, as the case might be, and one after the general election, should be filed. We believe, because the making and filing of such statements constitute the substance of and basis for the efficiency and value of the Corrupt Practice Act, that that part of Section 11790 requiring the making and filing of the expense statement by every candidate after both primary and general elections is mandatory, but that the provision requiring the filing of the statement within thirty days after the primary election, not being of the substance of the section, but being a provision merely of form and convenience of procedure in filing the statement, is directory, and that the statement may be filed after the 30 day period named in the statute, but within a reasonable time, prior to the general election, so that the contents of the statement may become publicized for the information of voters at the following general election.

Following the cited cases from our own Supreme Court and giving attention to the cited analogous cases from other states, and considering the section itself, that is our construction and conclusion respecting the provisions of said

Honorable Homer L. Swenson

Section 11790.

We will now consider the third question submitted.

A county clerk does not have any judicial or discretionary powers, such as would have to be exercised in determining the qualifications or eligibility of persons as candidates for public office. The duties of the office of county clerk are entirely ministerial. Our Supreme Court so held in *State ex rel. Attorney General, Plaintiff, vs. Bowen, Defendant*, 41 Mo. (217), reprint page 146. The Court (220), reprint l.c. 148, on this rule of law, said:

"* * * The office of the clerk of the County Court is essentially ministerial in its character. So far as the entry of the orders of the court are concerned, or the performance of any other act or thing which may be legally and properly required of him by the court, he is without discretion; he has no power to judge of the matter to be done and must obey the mandates of the tribunal whose officer and servant he is."

Our Supreme Court has not had occasion to pass upon the question of a county clerk, as such, refusing to place on the November election ballot the names of candidates of a political party because of the failure of such candidates to file the expense statements provided for in Section 11790. The Court has, however, decided, in similar cases, that a ministerial officer has no power to determine the qualifications or eligibility of a candidate for public office. The Court so held in *State ex rel. Frank H. Farris vs. Roach, Secretary of State*, 246 Mo. 56. The then secretary of state had refused to certify the relator's name as a presidential elector-at-large to be printed on the Democratic ticket, on the ground that the State Democratic Committee had removed his name from the party's ticket, declaring the place vacant, and had named another person to fill such vacancy, because the relator, at the time of the nomination by the Democratic Convention beforehand, was a state representative from Crawford County, Missouri, and was ineligible to serve as such elector, under the terms of Section 12 of Article 4 of the Constitution of Missouri, 1875, upon such facts being certified to him. Mandamus followed on behalf of relator to compel the secretary of state to certify relator's name as such nominee.

Honorable Homer L. Swenson

The Court, in deciding the case for relator, on the ground that the duties of the secretary of state are ministerial and that it was his duty to certify relator's name, l.c. 64, said:

"By the provisions of the statute (Secs. 5849 and 5850, R.S. 1909), when the certificate of nomination by the convention held on February 20, 1912, was filed with respondent, and no objections filed thereto, it became his duty to certify the name of relator as such nominee to the proper county officials. Section 5849 provides that all certificates of nomination which are in apparent conformity with the provisions of law shall be deemed to be valid, unless objections are filed thereto within three days. In the absence of such objections, the validity of such nomination stands unquestioned, and the duty of the Secretary of State to certify same is purely ministerial. * * *."

In its discussion of the merits of the case and in holding that the eligibility of the relator to serve as such elector could not be question in the proceedings, the Court, l.c. 71, further said:

"In the case before us the relator is not asking that the respondent be required to give him a title to the office. He has not been elected to the office, and may not be elected. A convention of his party has seen fit to nominate him as a candidate. This is but the first step. The law may prescribe, and has prescribed, qualifications for officeholders. It has also undertaken in recent years to regulate the manner in which candidates shall be nominated, but we are not aware of any law which undertakes to define the qualifications of candidates for nomination. So far as the law is concerned, the people may nominate and vote for an ineligible candidate at their risk. When such candidate seeks to be inducted into office, or even to secure the final act which recognizes his title, then the objection that he is ineligible may be interposed."

Honorable Homer L. Swenson

The Court in concluding its opinion, l.c. 73, held:

"If we were to hold that, upon a mere certificate of nomination, the eligibility of a candidate may be challenged, as was done in this case, and an adjudication by the court be invoked thereon, we should have established a dangerous precedent for the assumption of judicial functions by ministerial officers and central committees.

"We hold that the question of the eligibility of relator is not before us for decision, and that, regardless of his qualifications, it is the duty of respondent to certify out the nomination of relator. It is ordered that the peremptory writ issue."

The Supreme Court, in State ex rel. Cameron vs. Shannon, 133 Mo. 139, held that the duties of the city comptroller of Kansas City, Missouri, Shannon, were ministerial only and that he had no power to refuse to approve the bond of Cameron as superintendent of waterworks on the ground, as taken by Shannon, that Cameron had not been legally appointed as such superintendent. The Court so holding, l.c. 165, on this point, says:

"But we are of the opinion that the right of relator to the office can not be inquired into in this proceeding. No authority or power is conferred on the comptroller of the city to pass upon or decide the validity of relator's claim to the office. His duty with respect to the approval of the bond of the superintendent of waterworks, is purely ministerial. * * *."

The Court, ordering mandamus against Shannon, l.c. 168, held:

"The bond seems to be in proper form and the sureties entirely responsible for the amount of its penalty, and as no sufficient reason is shown by the return why respondent should not perform an act purely ministerial, and

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which he alone is clothed with power to perform, the demurrer must be sustained, and peremptory writ awarded."

The Corrupt Practice Act of the State of Idaho is almost identical in its provisions, and its apparent purpose, with the Corrupt Practice Act of this State. In the State of Idaho it appears that county auditors are the officials performing the duty to print the names of nominees on general election tickets. That duty is imposed upon county clerks in this State. The identical question we are here considering was before the Supreme Court of Idaho for decision. The case is reported in 110 Pac. 1035. The reported decision is not lengthy. It is so nearly identical, in both its recital of the facts and the applicable rules of law, to our question here that we quote the opinion in that case. The opinion, l.c. 1035, 1036, states:

"This is an application for a writ of mandate against the auditor of Fremont County, compelling him to cause the name of petitioner, Hiram G. Fuller, to be printed on the official ballot as the Republican candidate for county treasurer of Fremont county to be voted on at the general election in November. It is alleged by the petitioner that he was duly and regularly nominated by the Republican party at the primary election held in August as the nominee of that party for the office of county treasurer. It is further alleged that the county auditor refuses to have the petitioner's name printed on the official ballot, for the reason that petitioner did not file his expense account, as required by sections 25 and 26 of the primary election law (Sess. Laws 1909, pp. 204, 205), within 10 days after the date on which the primary election was held.

"Section 25 of the act provides that every candidate for nomination under the terms of the act shall not more than 10 days after holding the primary election file an itemized statement in writing, duly sworn to as to its correctness, setting forth the items of expenditures made by him for the purpose of securing or influencing or in any way affecting his nomination.

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Section 26 of the act provides that any candidate who shall fail, neglect, or refuse to file with the proper officer the statement provided for by section 25, within the time provided therein, or to fully set out in detail the sums expended by him, etc., shall be guilty of a misdemeanor, and then prescribes the penalties, among which is that of ineligibility to become a candidate for the office to which he was nominated.

"The only question with which we have to deal at this time is that of the power of the county auditor to refuse to have the name of a candidate printed on the official ballot where he has been declared by the canvassing board to be the nominee of his party. On this question there can be but little doubt. The duty of the auditor is purely ministerial. He is vested with no judicial powers or functions in the matter. He cannot sit in judgment on the candidate and without a hearing declare him guilty of a misdemeanor and inflict the penalties. *Miller v. Davenport*, 8 Idaho, 593, 70 Pac. 610. It is clearly the duty of the auditor to perform the duties required of him by law, and until the candidate has been judicially declared ineligible to have his name placed upon the ticket the auditor has but one duty to perform, and that is to cause the candidate's name to be printed on the official ballot along with all the other nominees for the respective offices.

"A peremptory writ of mandate will issue to Ira N. Corey, auditor of Fremont county, directing him to place the name of the petitioner, Hiram G. Fuller, on the official ballot as the Republican nominee for the office of county treasurer to be voted upon at the ensuing general election. Costs awarded in favor of plaintiff."

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Considering, as we do, that the authorities herein cited are decisive of this question, it is plain that a county clerk, being a purely ministerial officer, cannot pass upon or determine the eligibility of nominees as candidates of a political party, and that such officer has no power to refuse to certify their names as candidates of their political party to be placed on the general election ballot because such nominees have failed to file, or file later than thirty days after the primary election, the expense statements required by the provisions of said Section 11790.

CONCLUSION.

It is, therefore, the opinion of this department, considering the facts and the authorities cited herein, that:

1. It is mandatory, under the provisions of Section 11790, R.S.Mo. 1939, that the expense statement of every candidate at both the primary election and the general election be made and filed.
2. The time of filing the expense statement required by said section, after the primary election, by every candidate, is directory only and may be filed after the 30-day period after the primary election, but within a reasonable time before the ensuing general election.
3. A county clerk may not refuse to certify the names of nominees of a political party to be printed on the following general election ballot by reason of their failure to file their expense statements, or because of a later filing thereof than within the 30-day period after a primary election, fixed by Section 11790, for filing such statements. His duties are purely ministerial. He cannot pass upon the eligibility or qualifications of such nominees.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AGRICULTURE:
COMMERCIAL FEED:

"Ground Grain Screenings" is a "Commercial Feeding-stuff" as defined by Section 14319, R. S. Missouri, 1939, and the Missouri Feed Law, Sections 14319 to 14333, is applicable.

January 24, 1950

Honorable Robert T. Thornburg
Commissioner
Department of Agriculture
Jefferson City, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an opinion of this department, and reading as follows:

"Will you please give us an opinion on Section 14319, Revised Statutes of Missouri, 1939,--specifically as to whether or not 'Ground Grain Screenings' is classed as a 'Commercial Feed' and covered by the Missouri Feed Law. You will note that Section 14319 lists feeds that are NOT covered by the Missouri Feed Law, and does not include 'Ground Grain Screenings.'

"We have a feed manufacturer who contends that screenings have not been manufactured or processed, and are not to be fed to poultry and livestock as a feed, but are to be used as an ingredient to be mixed with other ingredients."

Section 14319, R. S. Missouri, 1939, provides as follows:

"The term 'commercial feeding-stuffs' shall be held to include all feeding-stuffs used for feeding livestock and poultry, except whole seeds or grains, the unmixed meals made directly from the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, and milo, whole hays, straws, cotton seed hulls and corn stover, pure corn chops and pure ground ear corn, when the same are not mixed with other

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materials, but the term shall not apply to other materials containing sixty (60) per cent or more of water."

It is to be noted that "Ground Grain Screenings," that is, the residue that is left when grain has been cleaned, is not among the feeding stuffs exempted from the definition of "Commercial Feeding-Stuffs" in Section 14319, supra.

Section 14326, R. S. Missouri, 1939, provides as follows:

"For the purpose of defraying the expenses of the inspection of feeds, each manufacturer, distributor or seller of any feed shall annually, on or before January first or before offering such feed for sale, pay a registration fee of two dollars (\$2.00) for each brand of feed registered under the provisions of this article. On or before January fifteenth and July fifteenth of each year, each manufacturer, distributor or seller of any feed shall make a statement under oath to the commissioner, setting forth the number of net tons of feed sold in the state during the preceding six months, ending January first and July first of each year, and upon such statement shall pay an inspection fee of eight (8) cents per net ton of two thousand (2,000) pounds. Any feed shall be exempted from the inspection fee when labeled with (a) the name and address of the manufacturer, (b) the brand name, (c) a declaration stating that such feed is to be used for mixing for resale purposes only, and (d) that the inspection fee is not to be paid thereon. All registrations shall expire on the last day of the calendar year for which issued."

Such section shows recognition by the Legislature that feeding stuffs used for feeding livestock and poultry may be used with other components to form another feeding stuff. Therefore, we believe, that the fact that the "Ground Grain Screenings" are to be used with other ingredients in producing a commercial feed does not preclude the "Ground Grain Screenings" coming within the definition of "Commercial Feeding-Stuffs." Section 14326, supra, provides that the feeding stuff which is to be mixed with other ingredients is not subject to the inspection fee provided in such section, if a specified label is placed thereon. Obviously, the purpose of this provision is to exempt the feed which is to be mixed

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with other ingredients from two inspection charges, since the resultant feed, or the mixture, is subject to the inspection fee as provided in such section. Section 14326 does not purport to exempt any feed from the operation of the act, but merely exempts certain feeds from double inspection fees when properly labeled.

CONCLUSION

It is the opinion of this department that "Ground Grain Screenings" constitute a "Commercial Feed-Stuff" as such term is defined in Section 14319, R. S. Missouri, 1939, and that persons selling, offering or exposing for sale or distribution, such "Ground Grain Screenings" within the State of Missouri must comply with the provisions of the Missouri Feed Law.

Respectfully submitted,

C. B. Burns, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SCHOOLS: After organization of enlarged school districts
COUNTY TREASURER: is completed, county treasurer may transfer
funds of common school districts to credit of
enlarged districts without issuance of warrant
by officers of common school districts.

9-21-50

September 18, 1950

Honorable H. Tiffin Teters
Ass't Prosecuting Attorney
Jasper County
Carthage, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"By Section 11 of the above act, it is provided that 'All funds in the hands of the County or Township Treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district.'

"The Jasper County Treasurer has taken the position that he cannot transfer the funds of common school districts to the enlarged districts unless the president and clerk of the common school district issue a warrant drawn on their funds payable to the order of the treasurer of the enlarged school district.

"The president and clerk of some of the common school districts have refused to issue such warrants.

"Will you please advise if under the above act the county treasurer has authority to transfer the funds of the common school districts to the treasurer of the enlarged district without the issuance of a warrant by the officers of the common school district or if the remedy is by mandamus against the common school district to compel such transfer of funds."

Honorable H. Tiffin Teters

In writing this opinion we assume that the enlarged school districts which have taken in the common school districts have been completely organized.

Section 11, Laws of Missouri, 1947, page 376 (Senate Bill No. 307), to which you refer in your letter, provides as follows:

"The terms of office of all school directors and officers of the various school districts comprising the territory incorporated in such enlarged school districts shall cease upon the adoption of the plan of reorganization and the organization of the board of directors, and such officers shall deliver to the board of directors of the enlarged school district all property, records, books and papers belonging to such component districts. All funds in the hands of the county or township treasurer to the credit of the various districts composing such enlarged district, shall be immediately transferred to the credit of the treasurer of such enlarged district. If any former six-director district shall be merged in any enlarged district, as provided herein, the treasurer of such former six-director district shall immediately turn over to the treasurer of such enlarged district, all funds belonging to such former six-director district, and shall make settlement therefor as provided by Section 10480, Revised Statutes of Missouri, 1939: Provided, that the directors of such enlarged district shall faithfully perform all existing contracts and legal obligations of the component districts."

(Underscoring ours.)

In an opinion to Honorable Hugh Phillips, Prosecuting Attorney of Camden County, under date of July 22, 1949, this office, in construing Section 11, supra, concluded that the board of directors of a common school district taken into an enlarged school district is empowered to continue the control of the fiscal affairs and property of such common school district until the election and qualification of the new board of directors of the enlarged school district. It was further concluded that a warrant issued by the board of directors of a common school district subsequent to the adoption of the plan of reorganization, but prior to the election and qualification of the board of directors of the enlarged district, was valid.

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However, after the adoption of the plan of reorganization and the election and qualification of the new board of directors of an enlarged district the terms of office of the directors of the component districts terminate and they lose control of all the fiscal affairs and property of their respective districts. Such being the case, the board of directors of the common school districts taken into the enlarged districts would, upon the happening of these conditions, lose all control of the funds in the custody of the county treasurer credited to such common school districts.

It is our thought that the remaining act required by the statute of transferring the funds credited to the common school districts to the credit of the treasurers of the enlarged districts would be accomplished by the county treasurer who has custody of said funds, and that no issuance of a warrant by the officers of the common school districts is required.

For your guidance, we enclose a copy of the afore-mentioned opinion.


CONCLUSION

It is therefore the opinion of this department that upon the adoption of the plan of reorganization by the voters and the election and qualification of the board of directors of the enlarged school districts the officers of the common school districts taken into such enlarged districts would lose control of the funds in custody of the county treasurer credited to the common school districts, and that the transfer of said funds to the credit of the treasurers of the enlarged districts would be accomplished by the county treasurer, and it would not be necessary that a warrant be issued by the officers of the common school districts to transfer said funds.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

RFT:ml
Enc.

LIENS:
VOCATIONAL REHABILITATION:

State-owned equipment used by person receiving vocational rehabilitation aid is not subject to a lien in favor of the owner of a building in which such equipment is used by the rehabilitation client.

October 18, 1950.

10/19/50

Mr. Joy O. Talley, Director
Vocational Rehabilitation
State Department of Education,
Room 1, Hotel Governor,
Jefferson City, Missouri.



Dear Sir:

This will acknowledge receipt of your recent letter requesting an opinion from this office. Your request reads as follows:

"Would you please give us an opinion on the following: Would past due rent be considered as the basis for a lien against State-owned equipment, such as placement equipment for Rehabilitation clients? Say, for instance, such as equipment for a shoe repair shop where the State owns the repair equipment and the Rehabilitation client is responsible for the rent on the building and other incidentals relative to the operation of the shop."

The "Vocational Rehabilitation Act" (U.S.C.A. Title 29, sections 31 - 41,) is a federal law, making available a program for the rehabilitation of disabled individuals who could become employable through the correction of, or training to overcome, a disability which constitutes a vocational handicap. Through a cooperative federal-state plan, the supervision, control and operation of the program rests with the State Board for Vocational Education administered under the Division of Public Schools. The provisions and benefits of this act of Congress were accepted by the Missouri General Assembly and the federal-state cooperative plan for vocational rehabilitation is administered under Missouri Revised Statutes, 1939, Sections 10549 to 10553 as amended by Laws of Missouri, 1944, Ex. Sess. p. 48.

The Vocational Rehabilitation Act reads in part as follows:
(U.S.C.A. Title 29, Section 33):

"(a) From the sums made available pursuant to section 32 of this title, the Secretary of the Treasury shall pay to each State which has an approved plan for rehabilitation, for each quarter or other shorter payment period prescribed by the administrator the sum of amounts he determines to be * * *

Mr. Joy O. Talley,

"(3) One-half of necessary expenditures under such plan for * * *

"(c) Transportation, occupational license and customary occupational tools and equipment not mentioned elsewhere in this section."

This department recognizes that in the administration of this state-federal cooperative rehabilitation plan the State Board for Vocational Education purchases customary occupational tools and equipment for the use of vocationally handicapped persons who are financially unable to purchase such tools and equipment. The State retains title to such tools and equipment, i.e. the individual for whose use they are provided does not acquire title to the tools or equipment. The vocationally handicapped person makes no payment to the state for rent for such tools or equipment and does not make any payment for the original purchase price of such tools and equipment, acquires no rights of ownership thereto, and if such individual ceases to use such tools or equipment they are retaken into the possession of the State Board of Vocational Training to be used by other vocationally handicapped individuals, sold, or otherwise disposed of by the said Board.

Your question presents a situation in which this state-owned equipment is used by a rehabilitation client in a building for which the client is responsible for the rent for the use of such building. You ask if past-due rent on such a building could ever be considered as the basis for a lien against such state-owned equipment.

We read at 53 C.J.S. p. 852, Section 7:

"One cannot create a contractual lien on the property of another without the owner's consent, and a person can give a lien on property only to the extent of his interest therein unless he creates the lien as agent of the owner. A statute conferring a lien should not be construed so as to impose the lien, by implication, on the property of one who is not responsible for the debt."

Since the rehabilitation client does not become the owner of the tools and equipment provided for his use by the State he could not, by contract, create a lien on the state-owned equipment without the consent of the State.

While as a general rule a lien may arise or be created only with the consent of the owner of the property to which the lien attaches,

Mr. Joy O. Talley,

it may be created by the operation of some positive rule of law in which event it may arise without his consent (53 C.J.S., p.834, Sec. 2). We know of no rule of law which would impose upon the property of the state a lien to discharge the obligation of a rehabilitated client for rent incurred in the operation of his business on a building in which the state-owned equipment was used. Assuming a judgment had been rendered by a court, the officer of the court could not levy execution on the state-owned equipment to satisfy the judgment obtained against the rehabilitation client. It is our opinion the landlord would have no lien which could be enforced by attachment proceedings.

As a matter of practice the state does not guarantee the payment of rent for the rehabilitation client and in nowise assumes the obligation of paying rent for such person.

In the case of *Brooks v. One Motor Bus*, 3 S.E. (2d) 42, 190 S.C. 379, the court said:

"It is also the law that no execution can be levied against the property of a county, state, or any political subdivision of the state, in the absence of a statute expressly granting such right in express terms.

"* * * the principle is adhered to that property held for public uses * * * is not subject to levy and sale under execution against public corporations. The compelling reason underlying the rule is that levying upon and selling property used for governmental purposes, such for instance, as a school district bus, engaged in the transportation of school children, might work irreparable injury, and could destroy the public school system of a district.

"* * * No lien is created by express provision upon the property of the state, and none can be established thereon by implication."

In the case of *Town of Farmerville v. Commercial Credit Co.*, 136 So. 82, 173 La. 43, the court said:

"The granting of liens on public property is against public policy. * * * It is a well settled rule that public property used for public purposes is not liable for sale for the payment of debts. To allow it to be done would thereby annihilate the public uses. For this reason public policy forbids a lien on public property."

Mr. Joy O. Talley,

CONCLUSION.

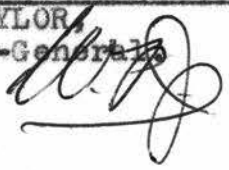
It is the opinion of this office that state-owned equipment held for use by a rehabilitation client would not be subject to a lien in favor of the owner of a building for the payment of rent incurred by the rehabilitated person.

Respectfully submitted,

JOHN E. MILLS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
Attorney-General



JEM/ld

MERGER OF CORPORATIONS:
INCIDENT TO MERGER:
TAXES:

A foreign corporation having absorbed a domestic corporation of this State by merger must pay the full privilege tax on its increased capital and surplus, if any, arising out of such merger, of such foreign corporation as is represented by the increased value of its property and business transacted in this State. Such corporation is not entitled to a credit on such tax or taxes paid by the domestic corporation upon its original incorporation.

January 23, 1950

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri



Attention: Honorable W. Randall Smart.

Dear Secretary Toberman:

This will acknowledge your letter requesting the opinion of this department, whether additional privilege taxes or fees must be paid to the State from the surviving foreign corporation in case of a merger by a domestic corporation and a foreign corporation, where, by reason of such merger, the proportion of the stated capital and surplus of such merged or surviving corporation as represented by a greater amount in value of property located and business transacted in the State of Missouri, has been increased since its qualification or domestication or domestication taxes or fees. Your letter also submits the question whether the surviving foreign corporation in such merger is entitled to a credit for incorporation tax paid by the domestic merging corporation upon the assessment of the tax due on the increase of capital stock and surplus of the foreign corporation by reason of the merger.

Your letter requesting this opinion is as follows:

"Under date of June 15, 1948, this department sent a statement to the above corporation in the amount of \$5,355.00 representing tax due on increase of corporate interest in the State of Missouri. The highest amount of corporate interest in this state upon which this corporation has paid a tax is \$11,500,000 and, under date of June 10 an affidavit was filed by this corporation showing the corporate interest had increased to \$22,208,292. (This figure representing the value of the property of the corporation located in the State of Missouri.)"

Honorable Walter H. Toberman

"The above corporation, the Gas Service Company, a foreign corporation qualified to do business in this state March 11, 1926, is refusing to pay this additional tax contending that the increase in Missouri arises from the results of a merger of the Kansas City Gas Company, a domestic corporation, with the Gas Service Company in 1946 and that the increase in corporate interest of the foreign corporation was due largely to the taking over of the property of the Kansas City Gas Company and that in determining the tax in the matter that we should give credit for the amount of corporation tax paid by the domestic corporation-Kansas City Gas Company.

"We are enclosing copy of letters received from the Gas Service Company as of June 16 and August 25, also copy of our work-sheet and copy of affidavit filed by the Gas Service Company.

"We have taken the position that in the absence of any provision in the statute that a tax should be paid upon any increase of the corporate interest in this state regardless of what source it may have originated. We would therefore appreciate your opinion as to our position in this matter at your earliest convenience.

"In connection with the above opinion, we would also like that you give us your opinion concerning the tax to be assessed where there are two or more domestic corporations merging under our present corporation code. Should this department take into consideration the tax theretofore paid by constituent corporations or consider the tax paid only by surviving corporation?"

You also submit with your letter correspondence with counsel for the Gas Service Company, the corporation surviving said merger, in which it appears that the Kansas City Gas Company, a domestic corporation, has merged its corporate business

Honorable Walter H. Toberman

property, franchise and affairs with the Gas Service Company, a foreign corporation, which thereby became the owner of the property of the domestic corporation. Your letter indicates that on June 15, 1948, your department delivered to the Gas Service Company, the surviving corporation, incident to the increase in its said property values, a statement demanding the sum of \$5,355.00 as a privilege or license tax or fee, due because of an increase in its capital and surplus by reason of said merger amounting to \$10,708,292.00, said sum having been computed on the basis of the value and amount of such capital and surplus, as is required with respect to computing an organization tax or fee of domestic corporations organized under or subject to the General and Business Corporation Act of Missouri, Laws of Missouri, 1945, page 711, l.c. 713, Section 113.

The Gas Service Company is resisting the payment of said tax because, as it says, it should have credit for the incorporation taxes originally paid by the merging corporation, and taking the position that under Section 4997.70, 1943, pages 448, 449, 450, the surviving or merged corporation is immune from the payment of the tax demanded since, as they contend, said Section 4997.70 grants the surviving corporation immunity and exemption from the payment of such tax to that extent. The letter of counsel for the surviving corporation, paragraph 2 of page 1, states the following:

"If this had been an ordinary increase of capitalization, I would understand the situation perfectly; but am unable to reconcile this additional tax when the same results from a merger of the Kansas City Gas Company with this company. * * *."

Counsel for the surviving corporation apparently confuses the question of the paying of tax on the increase of its stock by a domestic corporation, upon an amendment of its Articles of Incorporation, according to the terms of Section 113, page 713, Laws of Missouri, 1945, and the payment of a privilege tax by a foreign corporation upon the increase of its capital and surplus, if and when increased as required by Section 106, Laws of Missouri, 1945, pages 707, 708. The surviving corporation here is a foreign corporation. With the "ordinary" increase of its capitalization, neither this State, nor its officers, have any concern or authority whatever. That is a matter to be determined entirely, in

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the case of a foreign corporation, by the statutes of its domiciliary State. Our said Section 113 does require a tax to be paid by a domestic corporation both when it is incorporated and upon the increase of its capital, if any, according to the percentage of money value of the stock of such corporation, but there is no question of an incorporation tax or a tax because of any increase of the capital of the domestic corporation here. It ceased to exist under paragraph (b) of sub-section .70 of Section 4997, Laws of Missouri, 1943, l.c. 449, when the merger was effected. Our said Section 106 does require the payment of a privilege tax by a foreign corporation on the increase of its capital and surplus according to the value of its property employed in carrying on its business in this State regardless of the source of the increase, but that has nothing to do with a tax required of domestic corporations. So, the provisions of each statute, the one dealing with a corporation tax and a tax on the increase of the actual capital stock of domestic corporations, the other dealing with a privilege tax on the increase of the stock and surplus of the foreign corporation represented by the value of its property are so fundamentally different, that it seems it would be difficult indeed to so confuse them.

The provisions of Section 113, page 713, Laws of Missouri, 1945, and Section 106, pages 707, 708 of the same Session Acts, respectively, determine, we believe, the controversy which is the subject of the request for this opinion.

Said Section 113, provides the procedure which shall be followed upon the incorporation of a domestic corporation, respecting the amount and payment of the incorporation tax and fee upon becoming a corporate body, and upon the increase of its authorized shares.

Said Section 113 in so providing, is, in part, as follows:

"Section 113. Corporation tax or fee.--No corporation shall be organized under the general and business corporation act of Missouri unless the persons named as incorporators shall at or before the filing of the articles of incorporation pay to the Director of Revenue \$50.00 for the first \$30,000.00 or less of the authorized shares of such corporation and a further sum of \$5.00 for each additional \$10,000.00 of its authorized shares, and no increase in the

Honorable Walter H. Toberman

authorized shares of such corporation shall be valid or effectual until such corporation shall have paid the Director of Revenue \$5.00 for each \$10,000.00 or less of such increase in the authorized shares of such corporation, and it shall be the duty of said corporation to file a duplicate receipt of the Director of Revenue for the payments herein required to be made with the Secretary of State for the filing of articles of incorporation; * * *."

Said Section 106, pages 707, 708 of said Session Acts, 1945, requires every foreign corporation authorized to transact business in this State to file an affidavit by its president or other officer named, upon request by the Secretary of State, showing the capital and surplus of such corporation represented by its property and business transacted in this State, showing the value of its property, and whether or not its stated capital and surplus has increased since its incorporation or domestication, or since its last report, in order to determine the amount of domestication taxes, or fees that may be due the State. That part of said Section 106 so providing is as follows:

"It shall be the duty of every foreign corporation to cause an affidavit of its president or one of its vice-presidents to be filed when requested by the Secretary of State showing the proportion of the stated capital and surplus of said corporation which is represented by its property located and business transacted in this State and showing the value of the corporation's property located in this State at any time after its qualification or domestication so that it can be determined whether or not the proportion of its stated capital and surplus which is represented by its property located and business transacted in this State or the value of the corporation's property located in this State has been increased since its qualification or domestication or since its last report. In case it is shown that the proportion of the stated capital and surplus of such corporation which is represented by its property located and business transacted in this State (which shall in no event be less than the value of the corporation's property located in this State) has increased since its qualification

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or domestication, or since its last report and the payment of qualification or domestication taxes or fees above the greatest amount upon which the domestication tax or fees have heretofore been paid, it shall be required to pay domestication taxes or fees on all such increases as is required with respect to an organization tax or fee of corporations organized under or subject to this Act when increasing its authorized shares."

It is, therefore, apparent that the provisions of Sections 113 and 106, Laws of Missouri, 1945, place foreign corporations and domestic corporations upon an equal basis, with respect to the incorporation tax or fees to be paid by a domestic corporation upon its incorporation and upon the increase of its authorized shares, and upon privilege taxes required to be paid by foreign corporations authorized to carry on business in this State by requiring the same percentage and ratio of incorporation or increase of stock fee or tax per thousand dollars of the capital stock or increase thereof of a domestic corporation to be paid as is required per thousand dollars upon the increase of the capital stock and surplus representing the value of property located in this State of a foreign corporation doing business in this State, since its last report and the payment of qualification or domestication taxes or fees.

The State may deny foreign corporations the privilege of coming into the State altogether if the State so desires, and they may only come into this State upon such terms and under such regulations and control as the State prescribes. Our Supreme Court has so held in many cases. This is the holding of the Court in *State ex rel. vs. Vandiver*, 222 Mo. 206, 1.c. 230, where the Court said:

"As above stated, the Legislature may not only impose such conditions upon foreign corporations coming into the State as it may deem proper, but it may also exclude them entirely from the State.
* * *."

This is the universal rule in all other States so far as we have been able to learn.

14 A., C.J. under the title of "Corporations", 1.c. 1244, 1245, states on this subject the following:

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"* * * Subject to constitutional limitations, a state has the right to entirely prohibit foreign corporations from doing business within the state. Having the right to prohibit foreign corporations from doing business in a state at all, it is within the power of the state to prohibit the transaction of business by the foreign corporation within the state except upon compliance with such terms or conditions and subject to such restrictions as the state may in its discretion see fit to impose, * * *."

(Citing cases from forty-one States of the Union.)

It may be true, as said, that the Kansas City Gas Company, the domestic corporation, paid its corporate organization tax as required by the statutes of this State in force prior to, and commensurate in their terms with our present Section 113, Laws of Missouri, 1945, page 713, but even so, when the domestic corporation merged with the foreign corporation, the domestic corporation ceased to exist, its property became the property of the surviving foreign corporation, and there was no immunity or privilege of exemption by law moving to the Gas Service Company to relieve it from paying the tax on the increase in value of its property in this State or allow a credit thereon by reason of the merger because the merging domestic corporation had paid its incorporation tax at the time of its incorporation. The statute requiring the payment of its organization tax and stock increase tax by the domestic corporation according to the percentage of its capital and surplus in dollar value as is defined in said Section 113 is only the yardstick by which may be measured the amount of tax or fee due the State from the foreign surviving corporation, because of increase in value of its capital and surplus under said Section 106 because of the merger. The two statutes do not conflict one with the other. On the contrary, they complement each other in supplying equal protection of the law to both domestic corporations, and foreign corporations authorized to do business in this State, respecting the incorporation taxes and privilege taxes required of them, respectively.

Our Supreme Court has defined the purposes for which said Sections 113 and 106 were enacted by the Legislature, and has construed their meaning and effect with respect to the power of the State to require privilege taxes to be paid each year by a foreign corporation and incorporation taxes in the first instance to be paid by domestic corporations upon their organization

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and stock increase fees, if any, later. The Court discussed and construed these two sections in *State ex rel. Lee Co., Inc., vs. Bell, Secretary of State*, 195 S.W. (2d) 492. The case was a mandamus proceeding to compel the Secretary of State to file a duly authenticated amendment of the Articles of Incorporation of the H.D. Lee Co., Inc., increasing its corporate existence for fifty years from December 31, 1944. The relator, the Lee Company, was a Kansas corporation, incorporated December 31, 1894, for a term of fifty years. In 1916 the Kansas corporation was issued a certificate of authority to transact business in Missouri. It filed, prior to the suit, the certificate of the State of Kansas permitting it to extend, and extending, its corporate existence on January 22, 1944. It tendered an authenticated copy of the Kansas certificate to our Secretary of State with the regular filing fee. The Secretary of State refused to file the amendment to its Articles extending its corporate duration issued by the State of Kansas, on the ground that relator should again pay the same domestication fee or tax based on the capital represented, required for a foreign corporation to obtain an original certificate of authority to transact business in this state. The Lee case is based on a different state of facts than those being considered here, but the provisions and effect, respectively, of each of our said Sections 113 and 106 are discussed and construed in the case, and the holding of the Court, in that case, because of the terms of Sections 113 and 106, points out how and in what amount taxes, or fees, must be paid by a domestic corporation upon its incorporation and on the increase of its stock, and the taxes or fees to be paid by foreign corporations on the increase of their capital and surplus, according to the value of their property located in this State. The Court pointed out in the case and held that a foreign corporation must pay the additional tax on increase of capital and surplus provided for in said Section 106, according to the value of the increased capital and surplus in the same percentage and ratio of tax on such increase as is provided in said Section 113 to be paid by domestic corporations on their capital upon their incorporation and on increase of their stock. The Court, l.c. 494, 495, so holding, said:

"In 1885, when charters of companies organized under the 1866 Laws were about to expire, the legislature had provided authority for continuing corporate duration but required payment again of the same amount of tax as upon original organization. Laws 1885, p. 80, Sec. 2509, R.S. 1889, Sec. 5031, R.S. 1939, Mo. R.S.A. This section

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continued without amendment until repealed by the 1943 Act. Sections 55-58 of the 1943 Code, Secs. 4997.55-4997.58, Mo. R.S.A., now authorize a domestic corporation to change its period of duration by amending its articles of incorporation without payment again of the original organization tax. However, it must pay an additional tax upon any increase of its corporate stock (Section 114, 1943, Act, Sec. 4997.113, Mo. R.S.A.); and foreign corporations are likewise required to pay such an additional tax upon any increase in the proportion of its stock represented by property located and business transacted in this state by Sec. 106, 1943 Act, Section 4997.106, Mo. R.S.A. We think that the reasonable construction of those provisions is to authorize all corporations to extend duration by the same charter amendment method. Thus foreign and domestic corporations have been placed on the same basis by the 1943 Act both as to payment of tax upon beginning business, and upon increase of capital, and as to not being required to pay an additional tax upon extension of duration. * * *."

We are considering here the question of merger under the terms of said Sections 4997.62 to 4997.71, Laws of Missouri, 1943, page 410, l.c. 451, whereby the domestic corporation was engrafted into the life and existence of the foreign corporation, the accomplishment of which means that the domestic corporation ceased to exist. The result was, and is, to endow the surviving foreign corporation with the property of the domestic corporation and to increase the capital and surplus of the surviving corporation in the sum of \$10,708,292.00. These figures are taken from the affidavit made by the said foreign corporation itself and filed with the Secretary of State, June 14, 1948, wherein it is shown that the then total value of all of the property of said foreign corporation located in Missouri was \$22,208,292.34, and that the highest amount of the value of all of the property of said corporation upon which a privilege tax had theretofore been paid was \$11,500,000.00, therefore making the said \$10,708,292.00 represent the amount of the increase of its capital and surplus in this State since its qualification, domestication or last report.

The statutes of States providing for the consolidation or merger of corporations, the decisions of the high courts of

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the States where such statutes are in force and have been construed, and text-writers alike require and hold that all statutory taxes incident to a consolidation or a merger must be paid. 19 C.J.S., page 1382, on the subject states:

"Filing fees and organization taxes imposed by statutes must be paid, regardless of whether the statutes relate specifically to consolidation or merely to the formation of new corporations. This is true even though the new corporation retains the name of one of the old ones, and even though each constituent corporation has paid the proper fees and taxes on its own incorporation. * * *."

Many of the States have statutes authorizing the consolidation and merger of corporations. We have hereinabove given the citations of our statutes covering the subject. These statutes are the expression of the established public policy of this State on those subjects. Corporations, with respect to consolidation or merger, do not control the statutes. The statutes control them, and effect must be given in a merger, or consolidation, as the case may be, to the legislative intent, with respect to all incidents attending the merger or consolidation.

The rule of construction announced and followed by the Supreme Court of this State respecting the payment of such fees and taxes to the State as a privilege or service tax, or fee, is that the statute providing for such taxes or fees is to be strictly construed in favor of the State, that is to say, in favor of the payment of such taxes or fees to the State. This subject was before our Supreme Court in the case of Kansas City Railways Co. vs. Public Service Commission, 273 Mo. 173. That was a proceeding on certiorari from the Circuit Court of Cole County, involving the question of the payment by the Kansas City Railways Co. of fees to the Commission for services performed by the Commission provided for by Section 21 of the Public Service Commission Act, Laws of Missouri, 1913, page 567, for the performance of public duties by the Commission. The appellant Railways Co., resisted payment of the fees for the reason, as it claimed, the case was covered by a certain proviso of the statute in the nature of an exemption, (quoted in the opinion, l.c. 176) and because of which proviso no fees were chargeable. The Court held that the fees were chargeable and that the Railways Co. must pay. The Court in so deciding, and in holding that a statute providing for such fees to be paid to the State is to be strictly construed in favor of the State, l.c. 183, 184, said:

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"Appellant lays great stress upon the proposition that this statute, Section 21, must be construed strictly against the allowance of fees because strict construction is applied by the courts to statutes relating to fees. But the cases cited are all cases where a public officer charges fees, paid by the state or by some person, for his individual benefit. Here it is not the State which is paying, nor an individual who is receiving, the fees. The fees are payable to the State, and, by the express terms of section 21, go into the State Treasury to the credit of the General Revenue Fund. It is a tax, the proceeds of which are devoted to general public purposes. Appellant claims its property, the bonds, are exempt from this taxation. Statutory clauses, exempting certain property from the operation of statutes which are general in their application, imposing taxes, are strictly construed in favor of the State. (B.P.O.E. v. Koeln, 262 Mo. 444; State ex rel. v. Johnston, 214 Mo. 656.)"

The procedure contained in said Sections 106 and 113, is the only method the State may follow in dealing with foreign corporations to place them, once admitted into the State, upon an equal basis with domestic corporations on the matter of a privilege tax for continuing annual authority from the State to carry on the business in the State for which they are incorporated in the foreign State. The tax so required is a privilege tax. It is not, and could not be, a property tax, lest it fall within the prohibition of the Constitution against double taxation, for, of course, corporations, both domestic and foreign, pay their property taxes under other statutes.

The Supreme Court of New York had before it for construction in the case of People ex rel. vs. Rice, 11 N.Y.S. 249, a statute of that State on consolidation of corporations, with respect to whether the new corporation, created as the result of the consolidation of two corporations, was required to pay a new incorporation tax. The new corporation was refusing to pay new incorporation fees or taxes on the ground that both corporations had paid incorporation taxes in full, as required by the statutes, at the date of the original incorporation of each of them. The facts as stated in the opinion of the Court were

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that two corporations, the New York Phonograph Company and the Metropolitan Phonograph Company, were organized under the Manufacturing Act of 1848 and its amendments, the former for fifty years from October 4, 1888; the latter for fifty years from February 5, 1889. Each paid, on its organization, the tax upon its capital required by the statutes of the State of New York. Some years later they consolidated under the authority of the statutes of the State under the name of New York Phonograph Company, using the former corporate name of one of the consolidated companies. The consolidating companies, as and for the new corporation, when the consolidation should take effect, presented to the Secretary of State the requisite papers to be filed as provided for by the statute. The Secretary of State refused to file them on the ground that the tax required by the statute on the capital of the company to be formed had not been paid. The consolidating corporations filed mandamus to compel the filing. The application for mandamus was denied by the lower court and the relator appealed. The decision is not lengthy, if the reader desires to investigate, but too long to quote in full here. We shall, however, quote excerpts from the decision pertinent to the point being considered and which express the judgment of the Court. The Court held that the new corporation to be known as the consolidated corporation must pay the full amount of incorporation tax required by the statute upon the organization of a new corporation even though each of the corporations so consolidated had paid such tax on its own previous incorporation. The Court, in so holding, l.c. 250, 251, said:

"* * * The right of the consolidated body to be a corporation comes from the law of the state permitting the consolidation. Without such law the two companies could not consolidate. And that law, calling the consolidated body 'the new company,' specifies, in section 4, the corporate powers which it shall have. It is too plain for argument that, without such law, an agreement of consolidation would not create any body having corporate powers, but would be invalid. Hence it must be that the corporation is formed (or to be formed) under a general law of the state. But it is urged that the two consolidating corporations were corporate bodies, in full and vigorous life, entitled to their franchises which they had obtained from the state, and for which they had paid a tax,

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and that the new body is only a union of the two with no new corporate rights, and therefore liable to no new tax. It is true that the two consolidating bodies were corporations in full life, until they formed (or should form) the new corporation. Then they ceased (or will cease) to exist. It was for this very purpose that they executed the agreement; the purpose to and their own existence and to form a new person. Whenever they form the new corporation, their own corporate existence ceases. The new company is not a partnership of the two old companies. It is entirely a new corporation. * * * * * It is urged by the relator that, by payment of the tax, the consolidating companies purchased the right to be corporations and therefore, that they ought not to be compelled to purchase it again. But the payment of the tax is not the purchase of a right. Under our constitution and laws, corporate rights are not special concessions by the state; but they are general privileges in the power of all citizens, and the tax is in no sense a purchase price. The companies have no greater rights when they have paid the tax than they had before. The companies which have paid the tax have no greater rights than those have which were incorporated before 1866, and therefore paid no tax. And this shows, further, that it is immaterial to the present inquiry whether, or not, the consolidating companies paid the tax. If these companies had been incorporated before 1866, and had entered into a similar agreement of consolidation, the legal question as to liability to this tax would be the same as in the present case. So, too, if one had been incorporated before, and the other after, 1866. The construction given to the law imposing the tax must be uniform. It cannot vary according as the the consolidating companies have, or have not, been required to pay the tax."

The facts in the case, the legal principles involved, and the decision of the Court make the case analogous and persuasive here.

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Treating of the effect of merger of corporations as being practically synonymous with consolidation, 19 C.J.S. page 1386, has the following text which, we believe, supports our views herein expressed on this point:

"* * * Under statutes relating to the 'merger' of corporations, a merger has been given the same effect as a consolidation usually has, namely, to bring into existence a new corporation and to destroy the constituent corporations, except to the extent and for the purpose reserved in the statute. * * *."

Further treating of the status of both the original and the consolidated or merged corporation, 19 C.J.S. page 1385, Section 1626, states the following:

"The usual effect of a consolidation is to create a new corporation and dissolve the constituent corporation, which thereafter cannot issue stock but is not precluded from winding up its affairs. A merger in the street sense does not create a new corporation but the corporation into which the original corporations are merged continues to exist. * * *."

From the terms of our statutes hereinabove cited and quoted it conclusively appears, we believe, that upon no theory or ground whatsoever is the surviving foreign corporation in case of a merger with it by a domestic corporation entitled to any credit or exemption from paying the taxes for increase of its capital and surplus by reason of such merger. Such surviving foreign corporation must pay in full the tax imposed by this State upon any increase of corporate stock and surplus as represented by the value of its property located in this State and business transacted in this State, upon the terms and in the manner prescribed by said Section 106 in that regard, regardless of the source from which such increase may have been derived.

In your letter you submit also the question that where there are two or more domestic corporations merging under our present Corporation Code should your department take into consideration the tax theretofore paid by the constituent corporations, or consider the tax paid only by the surviving corporation. We take it that you mean by this, should the surviving

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corporation be credited with any incorporation or stock increase tax paid by the merging corporations to reduce the tax to be paid by the surviving corporation on its increase of capital stock, or surplus, by reason of and pursuant to the merger. We think there would be no difference with respect to the assessment and payment of the tax where both corporations perfecting a merger are domestic corporations than where, as in the present case, one of the merging corporations is a domestic corporation and the other a foreign corporation. The surviving or merged corporation would be liable, we think, in either case of merger or consolidation for the tax due on its increase of capital stock and surplus or property value by reason of the merger. The New York case hereinabove cited and quoted was a case where the consolidating corporations were both domestic corporations of that State.

CONCLUSION

It is, therefore, the opinion of this department that, upon the merger of a domestic corporation in this State with a foreign corporation authorized to carry on business in this State, the foreign surviving corporation must pay the full privilege tax upon the increase in value of its stated capital and surplus which is represented by the value of its property located in this State and business transacted in this State since its qualification or domestication or since its last report, without any credit thereon of incorporation taxes or taxes for the increase of its capital stock previously paid by the merging domestic corporation participating in said merger. This is required whether the merging corporations both are domestic corporations or one of the merging corporations be a domestic corporation and the other a foreign corporation.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:lr

ELECTIONS) Same persons may serve as judges of special referendum
) election and school election and same persons may serve
) as clerks of special referendum election and school
SCHOOLS) election.

January 30, 1950



2/2/50

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: J. Paul Markway, Chief Clerk

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, and reading as follows:

"We have been receiving inquiries from various county clerks as to whether or not the same judges and clerks may be used to conduct both their school elections and the special election on April 4th."

We find no prohibition in the constitution or statutes of this state against a person serving as a judge or clerk of a school election and at the same time serving as a judge or clerk of a special election at which the voters are to approve or reject a law referred by a petition of the people. The fact that there is no inconsistency in serving as a judge or clerk for different elections held on the same date is illustrated by the provisions of Section 10483, Laws of Missouri, 1943, page 885. Such section, which provides generally for school elections in city, town or consolidated school district, provides in part as follows:

" * * * Provided, that in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants, in counties containing not less than two hundred thousand nor more than four hundred thousand inhabitants according to the last national census, said elections may at the option of the board be held at the same time and places as the election for municipal officers and in all cities and towns

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having a population exceeding two thousand and not exceeding one hundred thousand inhabitants in other counties, said elections shall be held at the same time and places as the election for municipal officers, and the judges and clerks of such municipal election shall act as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose. Should such school district embrace territory not included in the limits of such city or town, the qualified voters thereof may vote at such voting precinct as they would be attached to, provided the ward lines thereof were extended and produced through such adjoining territory: Provided, that in any year in which a county superintendent of public schools is to be elected that the qualified voters of such town, city or consolidated district where registration of voters is required, must vote in the ward or precinct of which they are residents, if the place of voting has been so designated by the board of education. Provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding 2,000 and not exceeding 100,000 inhabitants.
* * *

Therefore, it is our view that where under the designation of the polling places for the school election and for the special referendum election, it is physically possible for the same person to act as judge or clerk of both elections, it is proper to do so.

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CONCLUSION

It is the opinion of this department that there is no constitutional or statutory provision which prohibits a person from serving as judge or clerk in a school election and a special referendum election, when both elections are held on the same day.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

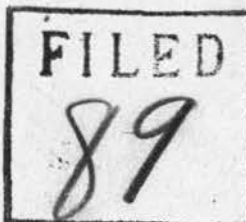


CBB/feh

NEWSPAPERS

-) Secretary of State must determine political faith of
-) newspapers for publication of notice of referendum
-) election from facts available to him.

February 23, 1950



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: J. Paul Markway, Chief Clerk

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"According to a recent opinion from your office, the publications covering the coming Referendum election on H. C. S. for House Bill No. 185 passed by the 65th General Assembly shall be handled in the same manner as publications covering elections on constitutional amendments.

"Section 2, Article XII of the state constitution says, '.....If possible, each proposed amendment shall be published.... in two newspapers of different political faith in each county....'

"The question has arisen as to whether the politics of a paper is determined by its listing with the Missouri Press Association and the Publications Department in this office or whether it can be determined by the known politics of the owner and his policies carried out in his paper."

The opinion referred to in your letter is one dated December 27, 1949, and addressed to you, in which we concluded, "It is the opinion of this department that a law which is made the subject of a referendum election must be published in the same manner as proposed constitutional amendments are published; that such publication is governed by the provisions of Section 2, Article 12 of the

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Constitution of Missouri, 1945, and that the newspaper, or newspapers, in which such publication is to be made are to be designated by the Secretary of State."

No legislation has been enacted to implement the provision of Section 2 of Article 11, Constitution of Missouri, 1945, quoted in your letter, and requiring publication, if possible, in two newspapers of different political faith in each county. The question of whether or not a newspaper is of a particular political faith becomes, therefore, a question of fact to be determined by the Secretary of State from the information available to him.

The primary objective is to obtain publication as was stated in the case of *People ex rel. Bonheur v. Christ*, 208 N.Y. 6, 101 N.E. 846, 1. c. 849, "The duty to publish is primary. The direction to do it in a particular way is secondary. When it is impossible to comply with both, the latter must give way to the former."

That the determination of the political faith of a newspaper is a matter of fact has been established by courts in other states under provision similar to that here involved. In the case of *People ex rel. Quinn v. Voorhies*, 187 N.Y. 327, 80 N.E. 196, 1. c. 197, the court stated:

"Of course, if the controversy should arise over the fact whether defendants did satisfy this test and designate papers advocating the principles of a certain party, it might be pertinent, as bearing upon and tending to the solution of the inquiry, to ascertain whether those papers did or did not support certain candidates and platforms. But, that would be a matter of proof under the provisions of the statute."

(Underscoring ours.)

In the case of *People v. Gorman*, 155 N.Y.S. 727, the court stated at 1. c. 733:

" * * * we are not prepared to hold that it was not competent for the respondents acting in good faith, to appoint a newspaper to publish the laws in behalf of the Republican

party which had not always been a party organ, in the place of one which had always fulfilled this role, but which, upon a particular occasion, and in the year then just coming to a close, had concededly varied its policy and had refrained from the support of some of the party candidates. If, as is claimed by the respondents, they reached the conclusion in good faith that the Elmira Star-Gazette more nearly represented and advocated the principles of the Republican party than the Elmira Advertiser (and no question is raised upon any other of the requirements), we see no reason why they might not properly designate the Star-Gazette; * * *

In the case of Ohio State Journal Co. v. Brown, 19 Ohio Circuit Court 325, the court considered the question of whether or not a newspaper, which held itself out to the public as an independent newspaper was a "newspaper of a political party," within the meaning of a statute pertaining to publication. In its opinion the court stated at 1. c. 326:

"A newspaper to be of a political party, within the meaning of the statute, must profess to be so or be so known. It is not sufficient that it has, while professing to be an independent newspaper, supported a political party.

"A newspaper professing to be of a political party, or one so known, may be independent in the sense that it does not advocate all of the measures of its party, and yet be of the party, for its conduct may be owing to its judgment, or the want of it, and not to its want of faith; and an independent newspaper may advocate all of the measures of a party and support all of its candidates, and yet be not of the party, for its support of the party is to be attributed to its discretion, and not to its allegiance.

"The evidence shows that the Columbus Dispatch holds itself out to the public as 'an independent newspaper,' and its proprietor testifies that it is not a Democratic

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not a Republican, nor a Prohibition, nor a Populist newspaper; that he is a Republican, and that his newspaper has generally supported that party, but that it is independent in all things and at all times free to choose which side it will take.

"Such a newspaper is not of a political party within the meaning of the statute, and in view of its disclaimer, the court ought not to be asked to hold otherwise."

We are of the opinion that although the listing of the politics of a newspaper with the Missouri Press Association and the Publications Division of the Office of the Secretary of State would be evidence tending to show the political party with which such newspaper is affiliated, such evidence is not the only evidence which might be considered by the Secretary of State, and he may also consider the question of whether or not the newspaper has supported the policies and candidates of the party which it purports to represent. Of course, in the absence of any information in such regard, we feel that the designation by the publisher, on file in the Publications Division of your office, may be relied upon by you in making your selections.

The known politics of the owner would not have any bearing on the matter unless the newspaper also supported and carried out such politics. In the case of *People v. Gorman*, 155 N.Y.S. 722, 1. c. 724, the court stated:

"It appears that the principal owner of the petitioner is Mr. Milo Shanks, of Elmira, N.Y., and that he owns the controlling interest in said paper and is its publisher. The affidavits, presented in opposition to the petitioner's motion, contain statements claimed to have been made by the publisher to the effect that he had joined another party and did not intend to support the candidates of the Republican party, and that the other party, to whom he was about to give allegiance, was going to sweep the state; that other party was one founded by ex-Governor Sulzer, known as the 'Guardians of Liberty.'

"In answering this allegation, Mr. Shanks denies that he made this statement, and

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swears that he is a Republican. This portion of the matter furnished on the contested questions at issue is referred to here solely for the purpose of saying that it is not pertinent to the issue and can have no bearing upon the questions considered. It leads to the further observation that a man has a right to belong to any party that represents his ideas and way of thinking, and he may conduct and publish a Republican newspaper, providing he supports the policies and candidates of that party."

Under the holding of the Ohio case, quoted above, a newspaper which has designated itself as "independent" is not a newspaper of any political faith, regardless of the fact that it might have supported candidates of a particular party. Therefore, such newspaper would be ineligible for designation, except in the absence of newspapers representing two political faiths.

CONCLUSION

Therefore, it is the opinion of this department that the Secretary of State, in determining the political faith of a newspaper for publication of notice of the referendum election on House Committee Substitute for House Bill No. 185 of the Sixty-fifth General Assembly, must ascertain the political faith of a newspaper selected by him from the facts available to him. The listing of its politics by a newspaper with the Missouri Press Association and the Publications Division of the Office of Secretary of State may be relied upon by the Secretary of State in determining the political faith of such newspaper, but it is not conclusive and the Secretary of State may consider whether or not the newspaper has in fact supported the candidates and policies of the party which it purports to represent. A newspaper which has designated itself as an independent newspaper is not a newspaper of any political faith, and, therefore, is not entitled to be designated except in the absence of newspapers representing two political faiths.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General

RRW/feh

NEWSPAPERS:

Selection of newspapers in City of St.
Louis for referendum publication.

March 1, 1950



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Some question has arisen as to the qualifications of the ST. LOUIS ARGUS and the ST. LOUIS LABOR TRIBUNE in the matter of publication of notice of House Committee Substitute for House Bill No. 185 passed by the 65th General Assembly.

"It appears from Section 14970 Missouri Session Acts 1941, p. 519 et seq. and Section 14971 Missouri Session Acts 1945, p. 1318, that the only newspapers in the City of St. Louis which are qualified to publish legal notices are those which have complied with the provisions of the said sections at a meeting of the Board of Judges of the St. Louis Circuit Court.

"We are informed that the only newspapers which qualified at the last meeting were the ST. LOUIS POST DISPATCH, the ST. LOUIS GLOBE DEMOCRAT, the ST. LOUIS STAR-TIMES, and the ST. LOUIS DAILY RECORD.

"From the foregoing information the following questions have arisen and we respectfully request your opinion as the Attorney General of Missouri.

"(1) Assuming the foregoing statement is true and correct, can the Secretary of State of Missouri now withdraw from the ST. LOUIS ARGUS and the ST. LOUIS LABOR TRIBUNE his commitments as to the legal printing to be done concerning the beforementioned referendum?

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"(2) In view of the fact that the above mentioned St. Louis newspapers, viz. the ST. LOUIS POST DISPATCH, the ST. LOUIS GLOBE DEMOCRAT, the ST. LOUIS STAR-TIMES, and the ST. LOUIS DAILY RECORD, have qualified at rates higher than the statewide rate, would it be permissible for the Secretary of State to enter into contract for the higher rates?

"(3) In the event that we cannot pay the higher rates required by those papers so qualified, what procedure will be necessary to follow in order to complete the required legal publication of the beforementioned referendum?

"(4) Without assuming the truth or accuracy of the foregoing statements, we respectfully request your opinion as to which publications in St. Louis City are qualified to accept legal printing contracts concerning the beforementioned referendum."

Section 14966, R. S. Missouri, 1939, as amended by Senate Bill No. 123, Sixty-fifth General Assembly, provides as follows:

"When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county, or for any public officer on account of, or in the name of any county, there shall not be charged by or allowed to any such newspaper for such publications a higher rate than ten cents per line for each insertion, the lines to be two inches long and to be set in type occupying twelve lines to the column inch, fractional lines to be charged and paid for as one line: Provided, however, that where any law authorizing and requiring the publication of any such law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice, shall require the use of a type having a body larger than six point, or more than one size of type, or the use of any emblem, or the spacing of lines so

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as to have a blank space between the lines, said printing shall be paid for by the inch of space used, single column of 12 ems pica wide, which price per inch shall not exceed the rate of one dollar per inch, single column of 12 ems pica wide, for each insertion. When any law proclamation, advertisement, nominations to office, proposed constitutional amendments, or other questions to be submitted to the people, order or notice, shall be required by law to be published in any newspaper, the rates herein specified shall prevail, and all laws or parts of laws in conflict herewith, except sections 14970 and 14972, Revised Statutes 1939, and Section 14971, laws of 1945, pages 1318 and 1319, approved July 3, 1946, are hereby repealed."

(Underscoring ours.)

Section 14968, R. S. Missouri, 1939, as amended Laws of 1943, page 859, provides:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time: Provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section: Provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications

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prior to the effective date of this section. Provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the Secretary of State of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. All laws or parts of laws in conflict with this section except sections 14970, 14971, 14972, Laws of Missouri, 1941, and Sections 7771, 7772 and 7773, Revised Statutes of Missouri, 1939, are hereby repealed."

Section 14970, R. S. Missouri, 1939, provides:

"In all cities of this State which now have, or shall hereafter have, a population of one hundred thousand inhabitants or more, all public notices and advertisements, directed by any court or required by law to be published in a newspaper, shall be published in same daily newspaper of such city, of general circulation therein, which shall have been established and continuously published as such for a period of at least three consecutive years next prior to the publication of any such notice."

Section 14971, as amended Laws of 1945, page 1317, provides:

"In all such cities a board consisting of the judges of the circuit court of such city or of the judicial circuit in which said city is situated, or a majority of them shall on or before the first day of January, 1942, and every two years thereafter, cause to be published in some daily newspaper of said city-

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a notice for at least twenty days announcing and designating the time and place when and where said board shall hold a hearing to determine what newspapers in such cities are qualified to publish public notices and advertisements under the provisions of the preceding section; and all newspapers in said cities desiring to publish such public notices and advertisements shall, on or prior to the date of each such hearing, file with the board a petition verified by the affidavit of one of the publishers thereof, that such newspaper has the qualifications set forth in the previous section and desires to be designated as a qualified newspaper under the provisions of the preceding section, and a majority of the board at such time and place shall determine what newspapers so petitioning are qualified under the provisions of the preceding section and shall make a record thereof and shall file a copy thereof with the clerk of all courts of record within such cities, and thereupon such newspapers shall be deemed and considered by all courts and officers of this state to be qualified under the provisions of the preceding section; Provided, however, that there shall not be charged by or allowed to any such newspaper for such publications a higher rate than fifteen cents per line for each insertion, the lines to be two inches long and to be set in type occupying twelve lines to the column inch, fractional lines to be charged and paid for as one line; Provided, however, that said petition shall be accompanied by a good and sufficient bond, in a sum to be fixed by said board, conditioned for the correct and faithful publication in said newspaper of all said public notices and advertisements, in manner and form as required by law and at rates not in excess of the rate fixed herein; Provided, further, that the board of judges of any such city, if the board shall deem it in the public interest, shall, in the manner hereinbefore prescribed, qualify any daily newspaper of general circulation for the publication of public notices and advertisements at rates higher than the maximum rates herein established, though such newspaper shall not file bond hereunder."

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The City of St. Louis being a city having a population of more than 100,000 persons, we feel that Sections 14970 and 14971 are applicable in determining the newspapers which are eligible to be designated for publication of the referendum on House Committee Substitute for House Bill No. 185 of the Sixty-fifth General Assembly. We call your attention to the fact that in Sections 14966 and 14968, quoted supra, specific provision is made to avoid any repeal by implication of Sections 14970 and 14971. Such being the case, we feel that the Legislature definitely intended those sections to be applicable in publication of all matters referred to in Section 14966 in the cities having a population of more than 100,000 persons.

In view of the foregoing we feel that the Secretary of State must select from the newspapers which have complied with the provisions of Section 14971, as amended. He would have no authority to contract for the publication in the City of St. Louis in a newspaper which had not so qualified.

" * * * Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. * * *" (Aetna Insurance Company v. O'Malley, 343 Mo. 1232, 124 S.W. (2d) 1164, 1.c. 1166)

If the newspapers which the Secretary of State had designated for the publication in St. Louis were not qualified under Section 14971, the Secretary of State would have no authority to enter into a contract with such newspapers, which would be binding upon the State of Missouri. Therefore, insofar as the liability of the State of Missouri is concerned, the Secretary of State must withdraw any commitment which he has made to a newspaper which is not qualified.

As for your second question, Section 14971 specifically authorizes the judges of the circuit court to fix a rate higher than that prescribed by the statute. Any such rate fixed by the circuit court would be such a rate as the Secretary of State or any other public official is authorized to pay in order to obtain the required publication. Inasmuch as Section 14971 controls in the City of St. Louis, the rates prescribed by Section 14966 have no bearing. Of course, the Secretary of State would have no authority to publish at rates higher than those which had been approved by the circuit judges.

CONCLUSION

Therefore, it is the opinion of this department that the Secretary of State, in designating newspapers for publication

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concerning the referendum on House Committee Substitute for House Bill No. 185, must in the City of St. Louis make his selection in accordance with Section 14971, R. S. Missouri, 1939, amended Laws of Missouri, 1945, page 1317. The Secretary of State has no authority to enter into a contract binding on the State of Missouri with any newspaper which has not qualified under said section. The Secretary of State is authorized in the City of St. Louis to pay the rate prescribed by the circuit judges in qualified newspapers under Section 14971.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

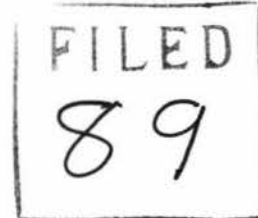
APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS:
POLITICAL PARTY:

Prohibition Party candidates entitled to
be certified to county clerks.

April 27, 1950



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting
an official opinion of this department and reading as follows:

"Since Section 11528, Missouri R.S. 1939 has
been repealed and according to Section 11561
R. S. Mo. 1939, it appears evident that candi-
dates for nomination on any political party
ticket which was on the ballot at the last
election may secure a place on the ballot this
coming election merely by filing their declara-
tion of candidacy along with the necessary re-
ceipt from the treasurer of their party.

"The Prohibition Party last filed a ticket in
1946. A declaration of candidacy on the Pro-
hibition ticket has recently been filed in this
office.

"We respectfully request your opinion as to
whether or not the candidacy of this person
should be certified to the several County
Clerks."

Section 11561, Revised Statutes of Missouri, 1939, provides
as follows:

"Whenever any person shall have filed as a
candidate for nomination upon a party ticket
which, at the last preceding election for
Governor, shall have cast less than 5 per
cent of the total vote cast for Governor in
such election, and when not more than one
person shall have filed as a candidate for
any office on such party ticket, no ballot
shall be printed for the primary election as
herein provided unless upon petition of at

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least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less than 5 per cent of the vote of the state."

We believe it to be obvious that Section 11561, quoted supra, means that when persons file as candidates of a political party, that where not more than one person shall have filed as a candidate for any office on such party ticket, that no ballot need be printed except upon petition as specified in said section, whether such party had candidates at the preceding election for Governor or not.

Obviously if the party filed no state ticket at the preceding election for Governor, such party would have cast less than five per cent of the total vote cast for Governor.

The Prohibition Party has long been recognized in this state as a political party which has definite political principles and a creed different from and opposed to that of other political parties. Therefore, we believe it would be clear that the persons that file proper declarations of candidacy on the Prohibition ticket are to be certified by you to the county clerks and boards of election commissioners, as are the persons who file declarations of candidacy on other political tickets.

If not more than one person files as a candidate for any office on the Prohibition Party ticket, and no petition as provided for in Section 11561 is filed, the provisions of Section 11561 will be applicable to such Prohibition Party candidates.

CONCLUSION

It is the opinion of this department that the names of persons who have filed proper declarations of candidacy on the Prohibition Party ticket should be certified to the several county clerks and boards of election commissioners, as are the names of those persons who filed declarations of candidacy on the other political party tickets.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

ELECTIONS: Declaration of candidates of "Christian
Nationalist" Party insufficient because no
POLITICAL PARTY: evidence that such a party exists.

April 27, 1950



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Herein enclosed you will find sworn statement and declarations which were presented yesterday, April 20, 1950, to this Department by a group of persons representing themselves to be a committee of an organization to which they referred as the Christian Nationalist Party. This group wishes recognition as a political party under the name "Christian Nationalist" and we would appreciate your furnishing this Department with an official opinion as to the sufficiency of these qualifying papers to justify this Department placing this name on the ballot and accepting the declarations of the candidates for the coming Primary Election."

With your letter you enclosed the regular declaration of candidacy for nomination to public office prescribed by Section 11550, Laws of Missouri 1944 Extra Session, page 24, and receipts for filing fee purportedly signed by Opal Tanner as treasurer of the State Central Committee of the Christian Nationalist Party.

In the case of State ex rel. v. Kortjohn, 246 Mo. 34, the Supreme Court said with regard to the establishment of a new political party the following, l.c. 42:

"There is nothing to be found in the statute laws of Missouri preventing the organization of a new political party at any time the electors of the State

April 27, 1950

see fit to so organize and declare principles. It may be true that we have made no express provision for an emergency of this kind, but it is equally true that from a legislative standpoint we have not placed a ban upon the organization of a new party, and personally I do not think we could place such a ban without treading dangerously near the constitutional inhibitions. We may regulate political parties after their organization in the exercise of the police power of the State, but that and no other power can suppress the alignment of our citizens with either old or new parties.

"For such new organization there must be a starting point, and because the law makes no express provision for the starting point, it does not follow that the citizens believing in given principles cannot meet and organize in the old and accustomed ways, but when organized they must follow the regulations as prescribed by law."

In the case of *State ex rel. v. Seibel*, 295 Mo. 606, the Supreme Court had before it the question of whether or not nominations certified by what purported to be the "Clean Elections" Party were valid. The Supreme Court said, l.c. 626:

"Under the terms of the statute referred to, after the filing of objections in conformity with the statute, the certificate did not import a presumption of verity and was not prima-facie evidence of the truth of its recitals. The burden was on the relators to prove that the Clean Elections Party was a political party; that the committee was duly constituted and that it made the nominations, and other facts set forth in the certificate. This was not done.

"It appears from the briefs of counsel and the oral arguments at the hearing of

April 27, 1950

this cause that the candidates named by the committee were selected, in part at least, from the nominees of the two dominant political parties nominated at the August primary election in St. Louis County. There is no suggestion that the Clean Elections Party had adopted a platform of principles or proclaimed a creed in opposition to the tenets of any of the recognized political parties that had nominated their respective candidates." (Emphasis ours)

* * * * *

"Note 90 in 15 Cyc. 326, reads: 'A political party authorized to certify nominations is a body of electors having distinctive aims and purposes, and united in opposition to other bodies of electors in the community within which it exists. (In re McKinley Citizens Party, 6 Pa. Dist. 109.) An organization may have polled the prescribed number of votes cast at a preceding election to constitute the aggregation of voters a political party, but if it has adopted no platform and proclaimed no political creed in opposition to the well defined principles of any established political party, inviting the support of the community at large, and not a mere section or fragment of it, it cannot be deemed a political party, authorized to nominate candidates in the usual way, within the legislative intent. (In re Jefferies, 9 Pa. Dist. 663, 24 Pa. Co. Ct. 529.)'

"Note 92, page 327, reads: 'The nomination of a county ticket and presidential electors by a so-called citizens' silver party convention is a nullity, where the contention was participated in by twenty-one electors of the county, who appeared in response to a personal invitation and after acting as a county convention then proceeded to hold a state convention, it appearing that no call for a state convention was ever given, or dele-

Honorable Walter H. Toberman

April 27, 1950

gates elected to either convention, or notice published throughout the state or county of the gathering of the new party. (State v. Johnson, 18 Mont. 548, 46 Pac. 533, 34 R.L.A. 313, approving State v. Rotwitt, 18 Mont. 502, 46 Pac. 370.)"

* * * * *

"It is obvious that the Clean Elections Party is not a political party as averred in the petition and the nominations under consideration were independent and non-political."

It appears, therefore, that before a political party can exist that a declaration of principles must be made so that such party will be in recognized opposition to other political parties.

Enclosed with your letter is the following communication:

"CHRISTIAN NATIONALIST PARTY
OF MISSOURI

April 19, 1950

"Secretary of State
Jefferson City, Missouri

Sir:

At the Missouri State Convention of the Christian Nationalist Party of Missouri, held April 19, 1950, in St. Louis, Missouri, the following persons were elected to serve as the State Committee of the Christian Nationalist Party until such time as a state committee is elected under the provision of the election laws of the state.

Attached hereto are Declarations of nominations for a portion of the candidates approved by the Convention.

Our Convention was composed of 100 dele-

April 27, 1950

gates representing all sections of the State of Missouri.

State Committee: Chairman - Don Lohbeck, St. Louis; Vice-Chairman - John Hamilton, St. Louis; Secretary-Treasurer - Opal Tanner, St. Louis; William Wolfe, Mineral Point; Otto Ankersheil, Marston; Edward Abshier, St. Louis; Joel Sugg, St. Louis; George Marquardt, Ferguson; Charles Hasty, California; Jesse Cruse, Schell City; Al Hoorman, Florissant; Dewey Taft, Jefferson City.

We respectfully petition that we be granted recognition as a bona fide political party and granted a place on the ballot in the August, 1950, Primary Election, to be held in the State of Missouri.

s/ Don Lohbeck

s/ Albert Hoorman

s/ Joel Danis Sugg

s/ John W. Hamilton

s/ D. M. Taft

Subscribed and sworn to before me this 19th day of April, 1950.

s/ Virginia Morris
Notary Public.

My commission expires April 7, 1954."

It is to be noted that the persons signing this communication do not state anything further than that a Missouri State Convention of the Christian Nationalist Party of Missouri was held in St. Louis, composed of one hundred delegates representing all sections of the State of Missouri, and that certain persons were elected to serve as the State Committee of such party.

Such communication offers no proof that a political party known as the Christian Nationalist Party actually exists, holding certain definite principles or a creed in opposition to the principles or creed of other political parties. Until evidence is furnished you that there actually has been organized in this state a political party known as the "Christian Nationalist" Party, no effect should be given to the filing

Honorable Walter H. Toberman

April 27, 1950

of these declarations in your office, since Section 11550, Laws of Missouri 1944 Extra Session, page 24, provides for the filing of the declaration as a candidate only as a candidate of some political party or as a candidate on an independent or nonpartisan ticket, and these declarations purport to be as candidates of a political party.

CONCLUSION

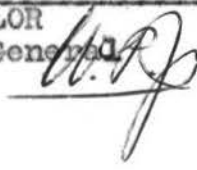
It is the opinion of this department that no action should be taken by you with regard to certifying to the county clerks and election boards the names of those persons filing declarations of candidacy in your office as candidates on the Christian Nationalist ticket, unless proof is given to you that there is in Missouri a political party known as the "Christian Nationalist" Party, which has principles or a creed in opposition to the principles or creed of other political parties.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General



CBB:lrt

ELECTIONS:
POLITICAL PARTY:

Declaration of candidates of Christian Nationalist Party sufficient because evidence of existence of such party is sufficient.

May 19, 1950



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Enclosed is a photostatic copy of papers filed on May 6, 1950 in this office by representatives of the Christian Nationalist Party.

"We respectfully request your opinion as to whether or not these papers along with those previously filed in this office - photostatic copies of which are in your files - are sufficient evidence that there is in Missouri a political party known as the Christian Nationalist Party and that we should certify the names of the candidates who have filed declarations to the county clerks to be placed on the ballot in November 1950."

In an opinion rendered to you under date of April 27, 1950, the following conclusion was reached:

"It is the opinion of this department that no action should be taken by you with regard to certifying to the county clerks and election boards the names of those persons filing declarations of candidacy in your office as candidates on the Christian Nationalist ticket, unless proof is given to you that there is in

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Missouri a political party known as the "Christian Nationalist" Party, which has principles or a creed in opposition to the principles or creed of other political parties."

After examination of the photostatic copies furnished by the purported Christian Nationalist Party of Missouri, it is our view that the requirements made in the conclusion in the opinion of April 27, 1950, quoted supra, have been met, since the photostatic copies show that there is in Missouri at present a political party known as the "Christian Nationalist" Party, which party has a definite creed or principles in opposition to the creed or principles of the other political parties of this State.

It is, therefore, our view that the persons who filed declarations of candidacy in your office as candidates of the "Christian Nationalist" Party prior to April 25, 1950, accompanied by receipts from the treasurer of such party showing the proper amounts have been paid to such treasurer, are entitled to be certified out as candidates of the "Christian Nationalist" Party for the primary election to be held in August of this year.

CONCLUSION

It is the opinion of this department that the requirements contained in the opinion to you dated April 27, 1950 have been met by a showing that there exists in Missouri a "Christian Nationalist" Party, which party has principles or a creed in opposition to the principles or creed of the other political parties in this State.

Respectfully submitted,

C. B. Burns, Jr.
Assistant Attorney General

APPROVED:

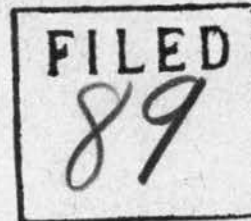
J. E. TAYLOR
Attorney General

INSANE PERSONS:
REASONABLE NOTICE OF PROCEEDINGS:
QUESTION OF FACT:

Reasonableness of written notice of insanity inquiry served upon alleged insane person prior to hearing as provided by Section 9336 Mo. R.S.A. 1939, a question of fact to be determined from circumstances of each individual case.

June 2, 1950

Mr. J. W. Thurman
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



1/5/50

Dear Mr. Thurman:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which request reads as follows:

"Quite frequently matters arise in this county involving sanity hearings which seem to require immediate attention. It is not unusual for someone to appear before the Clerk of the Probate Court at a late hour at night alleging that certain members of their family have become violent and insisting that there is immediate necessity for a sanity hearing in such cases. It has been the practice where at all possible to handle those matters promptly and in many instances with very little notice to the person who is proposed to be confined.

"I am not unmindful of the law as it relates to notice to the person charged in such instances, however I find it rather difficult to apply the law in all cases. Apparently the courts hold that the notice should be reasonable and of course what is reasonable notice is to be determined from the circumstances. I therefore should like to have an opinion from your office as to what would be considered reasonable notice in an instance involving a person who becomes violent rather suddenly or at a time which would not seem to require the giving of two or three days notice before the hearing is actually held.

"In the event a complaint should be made charging someone with being violently insane and dangerous to himself and the community, should such person be arrested and confined in jail until at least two or three days have

elapsed in order to justify the question of notice under the statute or is it your opinion that the Probate Court would be justified in serving such party with the charge and if other statutory processes are followed and the hearing held immediately would this in your opinion suffice as reasonable notice.

"I shall be very grateful to you for your written opinion in due course."

Section 9335, Mo. R.S.A. 1939, provides for the necessary procedure to be followed for the admission of the insane poor to the state hospitals for nervous diseases, to which section we may refer to later. We assume that you are familiar with this procedure and shall not take the time to discuss this matter further.

Section 9336, Mo. R.S.A. 1939, sets out in detail the form of notice, the substance, and the service of same upon the alleged insane person a reasonable length of time before the date set for the hearing as well as the procedure for the arrest and temporary confinement of such persons pending the hearing against them. We shall find it necessary to refer to and to discuss the provisions of this section in detail hereafter. Said section reads as follows:

"Thereupon the Clerk shall cause the alleged insane person to be notified of the proceeding by written notice stating the nature of the proceeding, time and place when such proceedings will be heard by the Court, and that such person is entitled to be present at said hearing and to be assisted by counsel. Such notice shall be signed by the Clerk under the seal of the Court and served in person on the alleged insane person a reasonable time before the date set for such hearing: Provided, however, if the affidavit filed in compliance with Section 9335 of this act states that the alleged insane person is so deranged as to endanger himself or others or would be dangerous to the safety of the community by being at large and is not being confined or restrained, the Judge or Clerk of the Probate Court may issue a warrant authorizing the sheriff to apprehend such alleged insane person and confine him or her in some suitable place for such time as may be necessary to carry to a determination the proceedings to inquire into the condition of the said alleged insane person and may, if in the opinion of the judge issuing the warrant it is necessary, authorize one or more assistants to be employed. Said warrant shall be substantially in the following form:

Warrant

State of Missouri)
County of) ss.

The State of Missouri, to
WHEREAS, it appears that proceedings have been instituted for inquisition into the sanity of, and it appears to the satisfaction of the undersigned that the said alleged insane person is so de-ranged as to endanger himself or others and would be dangerous to the safety of the community by being at large, you are, therefore, commanded forthwith to arrest said person and confine him in some suitable place until the proceedings herein instituted have been determined, and you are authorized to take to your aid assistants, if deemed necessary by you. After executing this warrant make return thereof to the office of the probate clerk.

Witness my hand this day of....., 19...
Judge of the Probate Court.

"The clerk shall also issue subpoenas for the persons named as witnesses and such other persons as he may think proper, commanding them to appear before the probate court on the day set for the hearing, to testify concerning facts set forth in the said statement. Subpoenas may also be issued for witnesses in behalf of the alleged insane person."

It appears that your inquiry is summarized in the following sentence in your letter:

"I therefore should like to have an opinion from your office as to what would be considered reasonable notice in an instance involving a person who becomes violent rather suddenly or at a time which would not seem to require the giving of two or three days notice before the hearing is actually held."

While the request relates primarily as to what might be considered as reasonable notice to the alleged insane person, yet from reading an earlier portion of your letter it appears to have been the practice in your county in cases of this nature to give very little notice to the person whose sanity is to be inquired into at such hearing and that little significance has been attached to the giving of the notices. We feel that a complete discussion of the matter of the inquiry cannot be had without some reference herein as to what constitutes proper notice and service of same upon the alleged insane person.

It is our opinion that the importance of the issuance of proper notice and service of same upon such person a reasonable length of time before the hearing as provided by law cannot be overemphasized. In this connection we desire to call your attention to a few Missouri decisions in which we believe our position in this matter is fully sustained.

In the case of Johnson vs. Hodgon, 251 S.W. 1.c. 132, the court said:

"* * * In cases of this character, in which it is sought to deprive a citizen of his liberty or property or both, it is essential to the court's jurisdiction in the premises that the mandatory requirements of the law be fully complied with. An inquiry into one's sanity is a proceeding in invitum, and of the gravest character; and the law regulates with no little precision the jurisdictional steps to be taken therein. Notice thereof to the alleged insane person is not to be classed with notices of mere incidental steps in a proceeding duly instituted and wherein the court has acquired jurisdiction. The filing of a proper information and the service of notice thereof in accordance with the mandatory terms of the statute are jurisdictional. In this case the information is not assailed. But it clearly appears that the notice served upon relator failed to comply with the statutory requirements and therefore was, in law, no notice; and that consequently the probate court of St. Louis county, presided over by respondent, acquired no jurisdiction whatsoever to adjudge relator insane and to appoint a guardian for his person and estate. * * *"

In the case of Boatmen's National Bank of St. Louis vs. Wurdeman et al., 127 S.W. (2d) 438, it was held that the requirement that written notice must be served on a person whose sanity is the subject of inquiry is jurisdictional and cannot be waived by authorizing an attorney to appear for him. See also State ex rel. Terry vs. Holtkamp, 51 S.W. (2d) 13.

From these decisions it appears that the proper written notice required to be served under the statute is mandatory and that without proper notice, as provided by what is now Section 9336, supra, the court acquires no jurisdiction of the person and cannot legally adjudge him insane, appoint a guardian of his person and curator of his estate, or commit him to one of the state hospitals for treatment and that in such instance the entire proceeding is void.

Said Section 9336, provides what the notice shall contain, by whom issued and that it shall be served upon the alleged insane person a reasonable time before the date set for the hearing. It is noted that the section makes no exception with reference to the service of the notice where a person has become so deranged that he is likely to inflict death or great bodily harm upon himself or others of the community if he were allowed to run at large unrestrained. The same notice and service on such persons alleged to be violently insane is required as in the instance of persons who are alleged to be insane but of not such violent characteristics.

In those instances in which the affidavit required by Section 9335, states that the alleged insane person is so deranged as to endanger himself or others of the community by being at large, Section 9336 provides that the judge or the clerk of the Probate Court may issue a warrant authorizing the sheriff of such county to arrest the alleged insane person and confine him in some suitable place temporarily pending the inquiry and determination of his mental condition. The form of the warrant provided by said section is set out in detail and should be followed in all cases where it is necessary to confine the alleged insane person in order to keep him from doing violence to himself or other persons.

It is therefore our thought that under no circumstances can the proper notice and its service upon such person be dispensed with, but since none of the statutes referred to, nor any court decisions in this state define the term "reasonable time," with reference to what length of time the notice must be served upon such person prior to the sanity hearing, we shall decline to state that a notice served a certain number of days before the hearing will be reasonable, and sufficient under the law. As indicated in your letter the reasonableness of the notice is a question of fact and will vary with the circumstances of each particular case. However, it appears that as close an approximation to the meaning of the above terms that we have been able to discover is found in the case of Sterling Mfg. Co. vs. Hough, 49 Nebraska 618, in which it was held:

"A reasonable time, within the meaning of the rule that notice must be served a reasonable time before the hearing, means such time that the party notified will have ample time to prepare himself, and be able to be present at the time and place set for the hearing."

While we have no Missouri decisions which declare what length of time is considered to be reasonable for the issuance and service of notice upon the alleged insane person in cases of this kind, we do have a few decisions of a negative character, which declare that the alleged insane person was not given reasonable notice under the circumstances.

In the case of Ex parte Trant, 175 S.W. (2d) 1.c. 163, the court said:

"From the admitted and undisputed facts, it seems clear that petitioner was not served with written notice 'a reasonable time before the date set for such hearing.' In State ex rel. Terry v. Holtkamp, supra (330 Mo. 608, 51 S. W. (2d) 18), in discussing a similar provision in a statute relating to insanity hearings in the probate court, the supreme court said: 'Thus section 450 (Mo. R.S.A. Sec. 449) requires that a written notice stating the nature of the proceeding signed by the judge shall be served in person on the alleged insane person a reasonable time before the date set for such hearing. * * * Certainly a reasonable time "before the date" set for the hearing would not be notice to appear on the same day the notice was served.'

"To like effect is the ruling of this court in Ex parte McLaughlin, 105 S.W. (2d) 1020.* * *

"We hold that the notice given in this case was not served 'a reasonable time before the date set for such hearing'; and as it did not comply with the statute it was, in legal effect, no notice, and the order committing petitioner to the state hospital was and is ineffective."

In the case of State ex rel. Terry vs. Holtkamp, 51 S.W. (2d) 13, it was held that a notice in an insanity hearing to the alleged incompetent to appear December 4, held not to authorize hearing and adjudication on November 27th, the day on which the notice was served.

In the case of Holthaus vs. Holtcamp, 277 S.W. 607, it appears that the notice served upon the alleged insane person three days prior to the insanity inquiry against him was regarded as sufficient or reasonable notice. However, the court held that the reasonableness of the notice could not be determined in a prohibition proceeding as the case at bar. This is the only Missouri case we have been able to find in which the service of the notice a certain number of days before the hearing was held sufficient but for the reasons stated in the opinion it does not appear that the court intended to say that a notice served three days (or any other specified number of days) prior to the hearing would be sufficient to constitute reasonable notice.

It is therefore our conclusion that the written notice to be served upon the alleged insane person is not required by the statutes or any court decisions to be served a specified number of

days in advance of the date set for the hearing, in order to constitute reasonable notice of such hearing. It appears that what would or would not constitute reasonable notice is in reality a question of fact to be determined from the circumstances of each particular case. The circumstances in each individual case may vary so widely from the circumstances in every other case, it is felt that the legislature and the courts have wisely refrained from fixing an arbitrary rule as to what shall constitute reasonable notice in all cases of this kind and not being aided by statutory authority or court decisions clarifying the meaning of reasonable notice, it is impossible for us to attempt a definition of the term at this time.


CONCLUSION

It is therefore the opinion of this department that the written notice required under the provisions of Section 9336, Mo. R.S.A. 1939, must be served upon an alleged insane person a reasonable length of time before the date set for an insanity inquiry against him regardless of the physical or mental condition of such person at the time of the service of the notice. That such statutory requirement as to notice is mandatory, and being jurisdictional cannot be waived by the alleged insane person or his attorney. That in the absence of statutory provisions requiring notice to be served upon the alleged insane person a specified period of time prior to the insanity inquiry in order to constitute reasonable notice of said hearing to such person, it is our further opinion that the reasonableness or unreasonableness of such notice is a question of fact to be determined from the circumstances of each individual case.

Respectfully submitted,

PAUL N. CHITWOOD,
Assistant Attorney General

APPROVED:



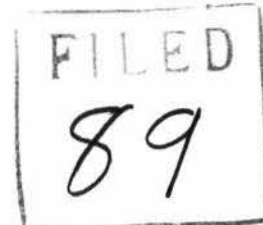
J. E. TAYLOR
Attorney General

PNC:mm

CENSUS:

The 1950 decennial census of the United States becomes official insofar as the authority of the County Court to pay an assistant prosecuting attorney is concerned, on January 1, 1951.

June 21, 1950



Mr. B. C. Tomlinson
Prosecuting Attorney of
St. Francois County
Farmington, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"Section 12939.4 Missouri Revised Statutes Annotated (Laws 1945, p. 1536, Section 4, reenacted Laws 1947, Vol. 1, p. 489, Section 1) provides for an assistant prosecuting attorney to be appointed in counties of the third class and as to the compensation of said assistant provides as follows:

"The compensation of an assistant prosecuting attorney shall be paid by the prosecuting attorney except that, with the approval of the county court in a county of the third class which now contains or may hereafter contain more than 35,000 inhabitants, an assistant may be paid out of the county treasury an annual salary not to exceed \$2400.

"If the 1950 Census shows the population of the county to be less than 35,000 whereas now it is more than 35,000 and an assistant is being paid by the county court as provided by the above law, at what time does the new census figures become official so that the authority of the county court to pay an assistant ceases?"

In answer to your question we would call your attention to Section 1.10 (645.13430) Senate Revision Bill No. 1001, of the 65th General Assembly, which said section reads as follows:

Mr. B. C. Tomlinson

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1, of each tenth year after 1951."

CONCLUSION

It is the opinion of this office that the 1950 decennial census of the United States becomes official, insofar as the authority of the County Court to pay an assistant prosecuting attorney is concerned, on January 1, 1951.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS: Form of Judicial Ballot approved. Instructions to County Clerks and Boards of Election Commissioners approved.

*mimeo copies
available 7-12-55*

August 18, 1950



Honorable Walter H. Toberman
Secretary of State
State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"Under the provisions of Sections 29 (a) to (g) of Article V of the Constitution, it is my duty to certify to the Clerks of the County Courts and to the Boards of Election Commissioners, the names of the Judges who are candidates on the Judicial Ballot, and instructions concerning the Judicial Ballot. The small number who in the past have voted the Judicial Ballot by comparison with the vote in the general election, and inquiries received by me, indicate the need for instructions with reference to the Judicial Ballot. I would appreciate your opinion whether the following would be in accordance with the law.

"1. To certify to said Clerks and Boards that the Judicial Ballot shall be in the following form:

JUDICIAL BALLOT

November 7, 1950

"Submitting to the voters whether the Judges named below, whose terms expire December 31, 1950, shall be retained in their offices

August 18, 1950

for new terms. VOTE ON EACH JUDGE. To
vote YES, scratch ~~YES~~. To vote NO, scratch
~~YES~~.

"Shall Judge _____ of the YES
Supreme Court of Missouri be retained
in office? (This will appear on the
ballots in all the voting precincts NO
in the State.) (Scratch one)

Shall Judge _____ of the YES
_____ Court of Appeals be
retained in office? (This will ap- NO
pear on the ballots in all the voting
precincts in the State except in the
St. Louis Court of Appeals district.)
(Scratch one)

"Follow in same form with names of each
circuit judge and other judges who are
candidates in Jackson County and the City
of St. Louis. My certification to each
Clerk and Board will have the full name
and official title to office of each Judge
who is a candidate in those two juris-
dictions.

"2. To instruct said Clerks and Boards
as Follows:

"You are required by Section 29 (c) (2) of
Article V of the Constitution to have the
Judicial Ballots printed, published (see
Section 11542, R. S. Mo. 1939), and
distributed in the above form; and the
Judicial Election shall be conducted by
the same public officials and in the
same manner as provided by the statutory
law governing voting upon measures pro-
posed by the initiative.

"3. To instruct said Clerks and Boards
as follows:

"That the printed cards of instruction for

August 18, 1950

the guidance of electors, required by Section 11601, R. S. Mo. 1939, to be distributed to and placed in each voting place, shall include the following:

"In voting the JUDICIAL BALLOT, vote on EACH JUDGE.' To vote YES, scratch ~~Ha~~. To vote NO, scratch ~~YES~~."

The Judicial Ballot provided for by Section 29 of Article V of the Constitution of Missouri formerly had the following information printed at the top of such ballot:

"Submitting to the qualified voters whether the judges hereinafter named, whose terms expire on December 31, 1948 shall be retained in office:"

The addition of the phrase "VOTE ON EACH JUDGE" we believe is helpful in that it makes clear to the voters that under the nonpartisan court plan established by Section 29 of Article V of the Constitution, each Judge is to be voted on for retention or rejection.

The provision "To vote YES, scratch ~~Ha~~. To vote NO, scratch ~~YES~~." is appropriate in demonstrating the correct method of voting for or against each Judge, particularly in view of the fact that the voting for the party candidates at such election will be by means of an "X" mark.

Section 29 (c), Article V of the Constitution of Missouri, provides in part as follows:

"Whenever a declaration of candidacy for election to succeed himself is filed by any judge under the provisions of this section, the secretary of state shall not less than thirty days before the election certify the name of said judge and the official title of his office to the clerks of the county courts, and to the boards of election commissioners in counties or cities having such boards, or to such other officials as may hereafter be provided by law, of all counties and cities wherein the question of retention of such judge in office is to be submitted to the voters, and, until

August 18, 1950

legislation shall be expressly provided otherwise therefor, the judicial ballots required by this section shall be prepared, printed, published and distributed, and the election upon the question of retention of such judge in office shall be conducted and the votes counted, canvassed, returned, certified and proclaimed by such public officials in such manner as is now provided by the statutory law governing voting upon measures proposed by the initiative."

Under the provisions of Section 29 (c) of Article V of the Constitution, quoted supra, the instruction you have listed under Point 2 of your opinion request is proper.

Section 11601, Revised Statutes of Missouri, 1939, provides as follows:

"The clerk of the county court of each county shall cause to be printed in large type, on cards, instructions for the guidance of electors preparing their ballots. He shall furnish twelve such cards to the judges of election in each election district, at the same time and in the same manner as the printed ballots. The judges of election shall post not less than one of such cards in each place or compartment provided for the preparation of ballots, and not less than three of such cards elsewhere in and about the polling place, upon the day of election. Said cards shall be printed in large, clear type, and shall contain full instructions to the voters as to what should be done: First, to obtain ballots for voting; second, to prepare the ballots for deposit in the ballot boxes; third, to obtain a new ballot in place of one accidentally spoiled; also a copy of sections 11545, 11623 and 11625."

Since such section requires that the instructions for the guidance of electors in preparing their ballots be printed on the cards required by such section, we believe it to be clear that the County Clerks and Boards of Election Commissioners should be instructed as provided in Point 3 of your opinion request.

Hon. Walter H. Toberman

August 18, 1950

CONCLUSION

It is the opinion of this department that the form of Judicial Ballot contained in your opinion request is a correct one which should be certified to County Clerks and Boards of Election Commissioners.

It is further the opinion of this department that the proposed instructions to County Clerks and Boards of Election Commissioners, found in Points 2 and 3 of your opinion request, are correct and should be sent to such Clerks and Boards.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:lrt

CONSTITUTIONAL Section 29 (b), Article V, Constitution
LAW: of Missouri, is not self-enforcing.
ELECTIONS:

September 5, 1950

9/6/50

FILED

89

Honorable Walter H. Toberman
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Enclosed you will find duplicate of a letter and petition received from Mr. Taylor Sandison on August 31, 1950. I believe his letter is self-explanatory.

"I hereby request your opinion as to what laws govern the method for effecting the change in the judicial selection authorized in Sec. 29 (b), Article V of the Constitution of the State of Missouri.

"Sec. 29 (b), which provides for the right to make the change, does not set up any provision relative to how such questions should be presented to the voters of the judicial district involved and does not state whether or not any instrument in the form of a petition, or otherwise, should be filed with the Secretary of State of Missouri."

The letter from Mr. Sandison states that petitions are being circulated requesting the submission to the voters of the Thirteenth Judicial Circuit of Missouri the question whether the court plan provided for in Section 29

September 5, 1950

of Article V of the Constitution of Missouri should be adopted in such judicial circuit. Such letter further states that the petitions are to be filed with you as Secretary of State in an attempt to have such question placed on the ballot in the Thirteenth Judicial Circuit of this State at the general election to be held November 7, 1950.

Section 29 (b), Article V of the Constitution of Missouri, provides as follows:

"At any general election the qualified voters of any judicial circuit outside of the City of St. Louis and Jackson County, may by a majority of those voting on the question elect to have the judges of the courts of record therein appointed by the governor in the manner provided for the appointment of judges to the courts designated in Section 29 (a). The general assembly may provide the manner in which the question shall be submitted to the voters."

(Emphasis ours.)

The general rule with regard to the question of whether or not a constitutional provision is self-executing is found in Volume 16, Corpus Juris Secundum, Section 48, page 98, where it is said:

"While a constitution need not provide the details for its operation, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect, as stated in Corpus Juris, it is within the power of those who adopt a constitution to make some of its provisions self-executing, and where the matter with which a given section of the constitution deals is divisible, one clause thereof may be self-executing and the other clause or clauses may not be self-executing."

Section 29 (g), Article V of the Constitution of Missouri, provides as follows:

Hon. Walter H. Toberman

September 5, 1950

"All of the provisions of sections 29 (a) - (g) shall be self-enforcing except those as to which action by the general assembly may be required."

We find that the only provision of Section 29 of Article V of the Constitution of Missouri requiring action by the General Assembly is the provision of Section 29 (b) of Article V, underlined supra.

Since there is no provision in the Constitution of Missouri authorizing the calling of an election on the question of whether or not a judicial circuit shall adopt the court plan provided for in Section 29 of Article V of the Constitution, either by petition or otherwise, it is our view that such provision is not self-executing, particularly in view of the language of sub-section (g) of Section 29, Article V of the Constitution. If Section 29 (b) of Article V of the Constitution were self-enforcing it would mean that sub-section (g) of such section would be completely superfluous.

It is axiomatic, of course, that all the sub-sections of Section 29, Article V of the Constitution of Missouri, are to be construed together and we believe that when sub-section (g) is properly construed in relationship to sub-section (b) of such section that it is clear that the provisions of sub-section (b) are not self-executing.

CONCLUSION

It is the opinion of this department that the provisions of Section 29 (b), Article V of the Constitution of Missouri, are not self-executing.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:lrt

STATE FAIR:

Commissioner of Agriculture may not lease fair grounds to United States from year to year for military purposes.

September 7, 1950



Honorable Robert T. Thornburg
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Enclosed please find photostatic copies of deeds to lands near Sedalia, Missouri, on which has been established and is now located the Missouri State Fair.

"Would you kindly advise whether or not I have authority unconditionally to lease all of the lands encompassed in said deeds to the United States for military purposes, for a term of one year, with option in the United States to renew said lease from year to year thereafter."

Section 14154, R. S. Missouri, 1939, provides in part as follows:

"For the purpose of encouraging the development of the agricultural, horticultural, mechanical, mineral, stock raising and all other industrial interests of the state of Missouri, there is hereby established a state fair, to be held annually at Sedalia, Missouri, and on the state fair grounds heretofore conveyed by deeds of conveyance to the state of Missouri and hereafter to be acquired by the state of Missouri as hereinafter provided; and said fair shall be under the control and management of the state commissioner of agriculture, as hereinafter provided; and said state commissioner of agriculture shall, with the approval of the governor, have authority to lease or purchase

Honorable Robert T. Thornburg

such lands, suitable for the use of the state fair, as may be deemed by said commissioner necessary and proper for such purposes. * * *"

Section 14155, R. S. Missouri, 1939, provides in part as follows:

" * * * and provided further, that should the state fail for three consecutive years to hold a fair, the land thus used for state fair purposes shall revert to the parties donating it."

Section 14159, R. S. Missouri, 1939, provides in part as follows:

"The commissioner of agriculture shall have power to make all rules, regulations and by-laws necessary and suitable for the conduct and government of the exhibitions, the sale of privileges, and for the proper control, operation and conduct of the fair not inconsistent with the purposes of this article, nor with the Constitution and laws of this state. He shall have the power to employ marshals, superintendents and assistants, needful for the proper management of the fair, and may rent out or donate the use of the grounds for stabling and training stock and holding stock sales, and the grounds herein named may be used, free of charge, by the state for encampment grounds for the state troops under the direction of the adjutant-general of Missouri, and other uses not inconsistent with the objects for which the fair is created: * * *"

(Underscoring ours.)

You have submitted copies of four deeds to the state of Missouri covering land now occupied by the state fair. The first is dated September 13, 1899, and conveyed 136 acres of ground. The deed contained the following recital:

"Know all men by these Presents, That J. C. Van Riper and Anna M. Van Riper, his wife, of the County of Pettis, in the State of Missouri, have this day, for and in consideration of the sum of One Dollar, and the permanent location and maintenance of the State Fair by the State of Missouri on the land

Honorable Robert T. Thornburg

hereby conveyed pursuant to the act of the
General Assembly establishing a State Fair,
Granted, Bargained and Sold, * * *"

Section 14155, quoted above, was in effect at the date of this deed (Section 7411, R. S. Mo., 1899). The other three deeds are dated May 28, 1921, January 23, 1922 and June 5, 1946. These deeds conveyed smaller tracts of land and no condition is contained in the deeds themselves.

The general law regarding contracts by public officers is stated in 43 Am. Jur., Public Officers, Section 290, page 100, as follows:

"Inasmuch as a public officer has only the authority that is conferred on him by law he may make for the government he represents only such contracts as he is authorized by law to make and he must comply with the requirements of law in respect to the manner in which, and the conditions upon which, contracts may be entered into."

Section 14159, quoted above, authorizes the Commissioner of Agriculture to rent the land occupied by the state fair for stabling and training stock and holding stock sales. The Legislature has also provided that the land may be used for encampment grounds for state troops under the direction of the adjutant general of Missouri and other uses not inconsistent with the objects for which the fair is created. Certainly the leasing of the entire grounds to the United States for military purposes would not involved a use consistent with the object for which the fair is created.

The Legislature has seen fit to permit the use of the grounds by state troops, but in doing so it undoubtedly had in mind the fact that encampments of state troops are of only limited duration, ordinarily lasting only two or three weeks in any one year, and, therefore, would not interfere with the use of the grounds as fair grounds. Leasing of the entire grounds to the United States for military purposes for a period of a year with right to renew from year to year is a far different matter from the temporary use of the grounds by state troops.

Furthermore, under Section 14155, quoted above, and the deed from the Van Rippers, quoted above, should the land covered by that deed not be used for state fair purposes for three consecutive years, the land would revert to the donors or their heirs. Certainly, any disposition of the lands by you which might result in their reversion under the provisions of the statute and the terms

Honorable Robert T. Thornburg

of the deed would be wholly inconsistent with the use of the grounds for state fair purposes.

CONCLUSION

Therefore, it is the opinion of this department that the Commissioner of Agriculture has no authority to lease unconditionally to the United States for military purposes for a term of one year with option to renew from year to year lands owned by the State of Missouri and occupied for the Missouri State Fair.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

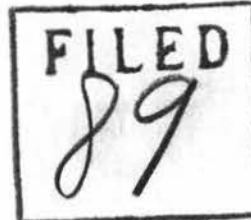
APPROVED:

J. E. TAYLOR
Attorney General

INSURANCE) Town Mutual Plate Glass Insurance Company may
) be formed under Sections 6203 and 6204, R. S.
) Missouri, 1939.

September 21, 1950

9-25-50



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: John F. Spalding

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Mr. Raymond J. Lahey, an attorney in St. Louis, Mo., has contacted this office and requested the right to form a Town Mutual Plate Glass Insurance Company, and I advised Mr. Lahey that we will not accept his application until we have received your opinion in regard to this matter.

"The question involved is as follows:

"Article 16, Chapter 37, of the Missouri Revised Statutes, 1939, provides the method of setting up Town Mutual Insurance Companies--which have for their purpose the business of insuring against property damage, from lightning, tornadoes, windstorms, cyclones and fire.

"Under Article 16, Chapter 37, Section 6187, provides that no Town Mutual Fire, Lightning, Windstorm, Tornado or Cyclone Insurance Companies may be incorporated after July 1, 1925; but Section 6203 under the same article and chapter pertains to

Honorable Walter H. Toberman

Town Mutual Plate Glass Companies, which is not specifically prohibited under Section 6187.

"Our question is--Can a Town Mutual Plate Glass Insurance Company be formed today under section 6203 and 6204, since Section 6187 does not specifically prohibit plate glass companies?"

Article 16 of Chapter 37, R. S. Missouri, 1939, deals with Town Mutual Insurance Companies. Section 6203 of said article provides:

"Hereafter all town mutual plate glass insurance companies, organized for the sole purpose of mutually insuring their members against loss or breakage to glass, and for the purpose of paying any loss incurred by any member thereof by assessment, as provided by their constitution and by-laws, may be incorporated under the provisions of this article, and shall be authorized to do the business provided for in the constitution and by-laws, and shall in all things be subject to the laws governing town mutual insurance companies, so far as the same are applicable thereto. Such companies shall be exempt from the provisions of the general insurance laws contained in this chapter, and nothing therein shall be so construed as to impair or in any manner interfere with any of the rights or privileges of any such companies doing a mutual insurance business in this state, as herein provided: Provided, that any such company may do business in any or all counties of this state; and provided further, that any member of any such company may sue such company the same as if he was not a member thereof."

Section 6204 provides:

"All town mutual plate glass insurance companies may incorporate by filing a

Honorable Walter H. Toberman

copy of their constitution and by-laws with the secretary of state, and paying the sum of ten dollars to said secretary."

Section 6187 of said Article provides:

"No town mutual, fire, lightning, windstorm, tornado or cyclone insurance company may be incorporated under the provisions of this article after July 1st, 1925: Provided, however, that nothing in this section shall be construed as restricting or abridging in any manner the right to do business under the provisions of this article of any town mutual, fire, lightning, windstorm, tornado or cyclone insurance company now incorporated and licensed to do business in this state."

The first provision regarding the formation of town mutual, fire, lightning, windstorm, tornado or cyclone insurance companies is found in Laws of 1895 at page 200. Provision regarding the formation of town mutual plate glass insurance companies is found originally in Laws of 1897, page 137. Thus, it is seen that town mutual plate glass insurance companies were from the beginning treated separately from the other types of town mutual insurance companies. In the adoption of Section 6187 prohibiting the incorporation of town mutual, fire, lightning, windstorm, tornado or cyclone insurance companies, after July 1st, 1925, no reference was made to town mutual plate glass insurance companies. In the 1949 revision the provisions of Section 6189 regarding the issuance of the certificate by the Secretary of State were omitted on the theory that provisions for the formation of town mutual fire, lightning, windstorm, tornado or cyclone insurance companies were obsolete. However, no change was made in either Section 6203 or 6204. (House Bill No. 2097, Sixty-fifth General Assembly.)

Repeals of statutes by implication are not favored, and for such repeal to occur there must be such total repugnance between the earlier and the latter statute that the earlier statute cannot stand. (State ex rel. to Use of George V. Peck Company v. Brown, 340 Mo. 1189, 105 S.W. (2d) 909.) We perceive no essential inconsistency between Section 6203 and Section 6204 providing for the organization

Honorable Walter H. Toberman

of town mutual plate glass companies, and Section 6187 prohibiting the formation of town mutual, fire, lightning, windstorm, tornado and cyclone insurance companies. Therefore, we feel that Sections 6203 and 6204 remain in force and effect, and town mutual plate glass companies may be organized under said sections. The fact that no change was made in these sections in the 1949 revision of the statute supports this view.


CONCLUSION

Therefore, it is the opinion of this department that town mutual plate glass insurance companies may be formed under the provisions of Sections 6203 and 6204, R. S. Missouri, 1939, and that said sections are not affected by the provisions of Section 6187, R. S. Missouri, 1939, prohibiting the incorporation of town mutual, fire, lightning, windstorm, tornado or cyclone insurance companies after July 1st, 1925.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

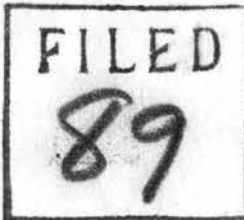
APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh

CORONERS:
PERPETUATION OF
TESTIMONY:



Section 13247, R. S. Mo. 1939, (Sec. 58.54, R. S. Mo. 1949) does not authorize the payment of a stenographer by a county (third or fourth class) to take down the testimony at a coroner's inquest. The coroner shall charge for taking down the testimony at an inquest as provided in said section and pay the money collected for so doing over to the county treasurer but the County

November 28, 1950

court may provide in the County Budget for the expense of necessary stenographic service for and on behalf of the coroner at inquests.

11-29-50

Mr. J. W. Thurman
Prosecuting Attorney
Hillsboro, Missouri

Dear Sir:

You have requested an official opinion from this department upon the following problem:

"The Coroner of this county has been paying a stenographer to take down the testimony at inquests in accordance with the provisions of Section 13247 R. S. Mo. 1939. The auditors are here and they have questioned his rights to this charge and as I examine the present law relating to Coroners as repealed and re-enacted, I find under Section 13249.4 Revised Statutes Annotated, that the fees of a Coroner have been changed to a salary, which in our case is a maximum of \$600.00 per year and no provision is made for the charge for taking down and preserving the testimony at an inquest."

Section 13247, R. S. Mo. 1939, provides as follows:

"For taking down the testimony at an inquest, the coroner shall be allowed ten cents for every hundred words, and twenty-five cents for certifying the same."

This section has not been repealed. It will be Section 58.54, R.S. Mo. 1949. This section does not authorize the coroner to pay, at the county's expense, a stenographer to take down the testimony at inquests. It is his authority for charging a fee for taking down the testimony himself.

House Revision Bill 2016, Section 58.10, of the 65th General

Hon. J. W. Thurman

Assembly provides:

"The coroner in counties of the third and fourth classes, shall charge and collect on behalf of the county every fee accruing to his office by law, except such fees as are chargeable to the county, and shall report and pay such fees over to the county treasurer in the manner provided by law."

This section means that the coroner must pay all fees accrued to his office to the county treasurer including compensation charged under and by virtue of the provisions of Section 13247, R. S. Mo. 1939, (Sec. 58.54 R. S. Mo. 1949). We are enclosing a copy of an opinion rendered by this office on March 17, 1950, to Mr. W. V. Mayse, prosecuting attorney of Harrison County, in which the question of the accountability of the fees collected by the coroner is considered.

The coroner shall charge for taking down the testimony as provided in said Section 13247, supra, and the money received for taking down the testimony shall be paid by the coroner over to the county treasurer.

In the case of *Bradford v. Phelps County*, 210 S.W.2d 996, a similar situation existed, in which the Legislature had made no provision for stenographic hire for prosecuting attorneys in third class counties. The Supreme Court, in an opinion in which all the judges of the court concurred, ruled the County Court could, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. In that case the court ruled:

"Of course the Legislature could have provided for salaries for stenographers of prosecuting attorneys in counties of the class including Phelps County, quite as have been provided by statute in counties of other classification. For example, see Laws of Missouri, 1945, pp. 574, 578, and 583, Mo. R.S.A. Secs. 12906 et seq., 12957 et seq., 13547.353 et seq. The Legislature has not done so. This does not mean the County Court of Phelps County should not, in the exercise of its discretion, make allowance for the expense of necessitous stenographic service to the prosecuting attorney. But, in the absence of legislation providing a salary or allowance for a stenographer or for stenographic service for

Hon. J. W. Thurman

the prosecuting attorney of Phelps County, the County Budget Law means the County Court of Phelps County has the power to make whatever allowance for stenographic service as it, in its discretion, may deem necessary with a regard to the efficiency of the prosecuting attorney's office, and to the receipts estimated to be available for that and other estimated expenditures, in short, to approve such an estimate as will promote efficient and economic county government. To put it in another and summary way--since Prosecuting Attorney could not rely on a statute particularly providing pay for his stenographic service, he should have necessarily expected such an allowance as the County Court of Phelps County in the honest, nonarbitrary performances of its duty under the County Budget Law would make. County Budget Law, supra, particularly Sections 10912 and 10917."

Section 13240, R. S. Mo. 1939, provides:

"The evidence of such witnesses shall be taken down in writing and subscribed by them, and if it relate to the trial of any person concerned in the death, then the coroner shall bind such witnesses, by recognizance, in a reasonable sum for their appearance before the court having criminal jurisdiction of the county where the felony appears to have been committed, at the next term thereof, there to give evidence; and he shall return to the same court the inquisition, written evidence and recognizance by him taken."

This statute makes it the duty of the coroner to set down the testimony of witnesses appearing before him at an inquest and to have the witnesses sign the written statement of his testimony. This statute also makes it the duty of the coroner to preserve this evidence so that it may be used in any litigation that may come out of the death that is investigated by the coroner.

It occurs to us that even though no specific statute sets up an allowance for payment for stenographic hire for preserving evidence of witnesses appearing at a coroner's inquest, that the county court may in its discretion, under the ruling of the Bradford case, make whatever allowance for stenographic service it may deem necessary with a regard to the efficiency of the

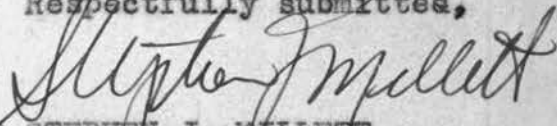
Hon. J. W. Thurman

performance of the duties imposed by statute upon the coroner. The allowance for such stenographic service would be made in the county budget relating to the coroner's office.


CONCLUSION

It is the conclusion of this department that Section 13247, R. S. Mo. 1939, (Sec. 58.54, R. S. Mo. 1949) does not authorize the payment of a stenographer by a county (third or fourth class) to take down the testimony at a coroner's inquest. The coroner shall charge for taking down the testimony at an inquest as provided in said section and pay the money collected for so doing over to the county treasurer. But the County Court may provide in the County Budget for the expense of necessary stenographic service for and on behalf of the coroner at inquests.

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

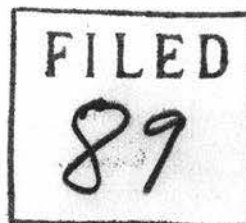
APPROVED:


J. L. TAYLOR
Attorney General

SJM:mw

OFFICERS: Governor shall commission all officers duly elected under
GOVERNOR: the new charter of St. Louis County *including county
supervisor and councilmen.*

December 15, 1950



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: Mr. J. Paul Markway, Chief Clerk

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"The Chief Clerk of the Board of Election Commissioners of St. Louis County in certifying the names of the county officers-elect has included the names of the county supervisor and seven councilmen. Since St. Louis County has adopted a new charter, and we are unable to find in the election laws anything covering this, we would like your opinion as to whether or not commissions should be issued by the State for the officers mentioned above.

"If you can give us this opinion at once, it will be considered as a great favor, as we are anxious to get all commissions issued by the 20th of this month."

The duly appointed Charter Commission of St. Louis County submitted a proposed charter for said county and same was submitted to the qualified electors of said county at a special election held on Tuesday, March 28, 1950. By their vote they adopted said charter, a certified copy of which has been filed with the Secretary of State.

The courts have held that the rules of construction applicable to statutes likewise apply to the construction of the Constitution. *McGrew v. Mo. Pac. Rr. Co.*, 132 S.W. 1076. Another well established rule of statutory construction is that all laws dealing with the same subject matter must be construed together and harmonized if possible. See *Johnson v. Kruckemeyer*, 29 S.W. (2d) 730, 224 Mo. App. 351; also *State ex rel. Cairo Bridge Co. v. Mitchell*, 181 S.W. (2d) 496, 352 Mo. 1136.

Honorable Walter H. Toberman

Section 3, Article II of said charter provides for the election of a county council and county supervisor, and reads:

"Section 3. The following County Officers shall be elected: Assessor, Circuit Clerk, Collector, four Constables, Coroner, seven Councilmen, County Clerk, heretofore known as the Clerk of the County Court, County Supervisor, Highway Engineer, Prosecuting Attorney, Public Administrator, Recorder of Deeds, Sheriff, Superintendent of Schools, and Treasurer."

Section 5, Article IV of the Constitution of Missouri, 1945, requires the Governor to commission all officers unless otherwise provided by law, and reads:

"The governor shall commission all officers unless otherwise provided by law. All commissions shall be issued in the name of the state, signed by the governor, sealed with the Great Seal of the state and attested by the secretary of state."

The foregoing constitutional provision follows Section 23, Article V, Constitution of Missouri, 1875.

Furthermore, Section 4 of said charter provides that the officers named in Section 3, supra, shall be nominated and elected in the manner provided by law for state and county officers, and each of said officers shall have all the power and perform all the duties provided by law, except as otherwise provided by this charter. Section 4 reads:

"Section 4. The above named elective County Officers shall except the Superintendent of Schools be nominated and elected for a term of four years in the manner provided for State and County Officers. The Superintendent of Schools shall be elected in the manner provided by law. Each shall have all the powers and perform all the duties provided by law, except as otherwise provided by this Charter."

We have searched the statutes to find some legislative authority contrary to the foregoing constitutional provision or implementing said provision and fail to find wherein the Legislature has enacted such a law. Therefore, in the absence of any such legislation, it is apparent that the foregoing

Honorable Walter H. Toberman

constitutional provision makes it mandatory upon the Governor to issue commissions to the newly elected members of the county council and the county supervisor under the new charter of St. Louis County.

In State ex rel. Attorney General v. Pool, 41 Mo. 32, 1.c. 36, 37, the court held that the Legislature was vested with authority to declare what requisites are necessary to clothe an officer with authority and induct him into office without the necessity of a commission. However, the court further held that until such an act is passed for that purpose, the constitutional injunction seems to be imperative. Furthermore, in State ex rel. v. Vail, 53 Mo. 97, the court held that the Governor has no power to inquire judicially into the qualifications of any candidate. Also, in State ex rel. v. Steers, 44 Mo. 223, the court held that an official derives his title to an office by election and not by the commission and if he is not legally elected, he may be ousted notwithstanding his commission.

In view of the foregoing, in order to give meaning to all provisions, a sensible construction would be to hold that the Governor shall commission all the duly elected officers under the Charter of St. Louis County.

CONCLUSION

Therefore, in the absence of any legislation conflicting with Section 5, Article IV, supra, authorizing the Governor to commission all officers, it is the opinion of this department that the Governor is required to commission the duly elected members of the county council and county supervisor of St. Louis County, Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

CBB
J. E. TAYLOR
Attorney General

ARH:VLM

SALE OF COUNTY PROPERTY: County Court has authority to convey real estate belonging to the county; has no authority to accept a note secured by a deed of trust from the purchaser to secure the unpaid balance of the purchase price.

December 21, 1950

Honorable B. C. Tomlinson
Prosecuting Attorney
St. Francois County
Farmington, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion from this office. Your request reads as follows:

"I would like an official opinion from your office in answer to the following situations: St. Francois County owns a County Poor House building with surrounding land. Can the County Court dispose of this property at a fair market price by sale to private individuals who intend to continue operating said home as a private nursing home wherein the county will board the patients that are now being kept at the County Poor House? Also can the County Court accept a deed of trust from the purchasers to secure the unpaid balance of the purchase price?"

Your first question, "Can the county court dispose of this property at a fair market price to private individuals * * *," is answered in the affirmative by an opinion from this office addressed to the Honorable J. R. Gideon under date of February 18, 1949. I am enclosing a copy of that opinion.

Your second question is : "Can the county court accept a deed of trust from the purchasers to secure the unpaid balance of the purchase price?"

In the case of *Butler County v. Campbell*, 353 Mo. 413, 182 S.W. (2d) 589, the Supreme Court reiterated a well-established principle in these words:

"County courts are * * * the agents of the county, with no powers except what are granted, defined and limited by law, and, like all other agents, they must pursue their authority, and act within the scope of their powers."

Honorable B. C. Tomlinson - # 2

While Section 2480, R.S. Mo. 1939, quoted in the above mentioned opinion, confers upon the county court the power to control and manage the property, real and personal belonging to the county with the power to sell and convey any real estate belonging to the county, I find nothing in the state statutes which would allow all or any part of the purchase price of the type of property you describe be covered by a note secured by a deed of trust on the property to be conveyed.

In the past it has been a well-established practice for the county courts to invest and loan money from the school fund. The power and authority to make such loans was specifically conferred upon the county courts by Sec. 10376, R.S. Mo. 1939. You will particularly note that this power and authority to make loans from this fund was specifically conferred upon the county court, however, and that no general power to make loans was given the court except from this fund. This section, 10376, was repealed and re-enacted by Laws 1945, p. 1628, and the power of the county courts to make investments from the school fund was limited by the following provision:

"On and after the effective date of this act, all real estate loans and investments now belonging to the county school funds, except those invested as hereinafter provided, shall be liquidated without extension of time upon the maturity thereof, and the proceeds thereof and the money then on hand belonging to said school fund of the county shall be reinvested in registered bonds of the United States, or in bonds of the state, or in approved bonds of any city or school district thereof, or in bonds or other securities, the payment of which is fully guaranteed by the United States Government, and shall be preserved as a county school fund."

You will note the county court no longer has conferred upon it the power to make loans to individuals from the school fund taking a mortgage or deed of trust as security for the repayment of such loan.

We direct your attention to Section 13683, R.S. Mo. 1939, which contemplates the extension of credit by the county court to a purchaser of certain real property from the county. Said section reads as follows:

Honorable B. C. Tomlinson - #3

"When any credit shall be given upon the sale of any lot for any part of the purchase money, the purchaser shall give his note or bond with sufficient sureties to the commissioner, for the use of the county, to secure the payment of each installment; and the commissioner shall deliver to the purchaser a certificate describing the lots sold, the price, the amount paid, if any, the balance to be paid, when due and how secured."

As pointed out in the case of Missouri and Southwestern Land Company v. Quinn, 73 S.W. 184, 172 Mo. 563, there is no authority under this statute for the county court to convey land until it is paid for. The court (or a commissioner acting as agent for the court) was authorized to deliver to a purchaser a certificate describing the lots sold, the price, the amount paid, the balance to be paid, when due and how secured. After notes given for the purchase price had been paid then a deed conveying the property was to be delivered to the purchaser. You will note, however, that this statute contemplated the extension of credit by the county court on the purchase price of particular land and is not a power to extend credit on the purchase price of other real property from the county. The only sale of real estate by the county which it was contemplated this statute would affect was that unused residue of land which had been reserved for county seat purposes. This statute is discussed here only for the purpose of emphasizing that while the county court had conferred upon it a limited power to extend credit to a purchaser in the sale of land which had been reserved for county seat purposes that court does not have a broad general authority in the sale of other land belonging to the county to accept a note secured by a deed of trust or mortgage for a part of the purchase price.

Article VI, Section 23 of the State Constitution reads in part as follows:

"No county * * * shall * * * lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

We find nothing in the Constitution which would authorize the county to extend credit on the sale of real estate as outlined in your letter.

Honorable B. C. Tomlinson - # 4

CONCLUSION

A county court has the power and authority to sell and convey real estate belonging to the county.

A county court does not have the power and authority to accept a deed of trust from the purchaser of real property belonging to the county to secure the unpaid balance of the purchase price.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General

ELECTIONS: Form of notice of special election approved.

February 24, 1950

2/24/50

Mr. James P. Uxa
Chief Clerk
Board of Election Commissioners
City of St. Louis
208 South Twelfth Boulevard
St. Louis 2, Missouri



Dear Sir:

This is in answer to your letter of recent date regarding the publication of notice of the special election to be held April 4, 1950, and reading as follows:

"As required by Section 12228 of the Revised Statutes of Missouri, 1939, this office will publish in three newspapers of this City on Friday, March 24, 1950, the locations of the 784 polling places to be used at the Special Election, April 4, 1950.

"We are submitting herewith copy of such notice for your correction or approval.

"Publication of the ballot, in its entirety, will be made March 27 and April 3, 1950."

We have examined the form of notice of election attached to your letter and have the following suggestions to make relative thereto.

The hours of opening and closing of the polls should be in such notice so that the voters may be fully acquainted both with the location of the polls and the hours during which they have the privilege of voting. We believe that with the insertion of the hours of the opening and closing of the polls, your notice would be sufficient.

Mr. James P. Uxa

February 24, 1950

We are enclosing a form of notice which we believe under the statute would be preferable to the form you have used.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



CBB:lrt
1 Enclosure

SCHOOLS:

Board of Curators has authority to continue to pay tuition for resident negro students when Lincoln University does not teach certain courses or subjects taught at University of Missouri.

July 31, 1950



Lincoln University
State of Missouri
Jefferson City, Missouri

Attention: Sherman D. Scruggs,
President

Gentlemen:

This will acknowledge receipt of your request for an official opinion of this department which reads:

"Since Negro students are being admitted to courses of study at the University of Missouri, at Columbia, which are not available at Lincoln University, a problem arises for the Curators of Lincoln University as to what action it should take on requests for tuition costs by those Negro resident students of Missouri enrolled in out of State universities in courses that are offered at the University of Missouri and not available at Lincoln University.

"In view of the above mentioned action by the University of Missouri pursuant to a recent Declaratory Judgment of the Circuit Court of Cole County, the Board of Curators of Lincoln University wishes to be advised as to the effect of the said Declaratory Judgment upon the out-of-state tuition program of the State of Missouri. A copy of the Declaratory Judgment is enclosed herewith."

The particular statute herein to be construed is 10779, Mo. R.S.A., which reads:

"Pending the full development of the Lincoln University, the Board of Curators shall have

the authority, if and when any qualified negro resident so requests, to arrange for his attendance at a college or university in some other state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

The primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent, and this should be done, from words used, if possible, considering the language honestly and faithfully. See *City of St. Louis vs. Senter Commission Company*, 85 S. W. (2d), 337 Mo. 238. Also see *Donnelly Garment Company vs. Keitel*, 193 S.W. (2d) 577, 354 Mo. 1138.

The foregoing statute merely vests in the foregoing Curators authority for arranging for attendance of qualified negro students, residents of this state, to a college or university of another state to take any course or study any subject provided for at the University of Missouri and which is not taught at Lincoln University and also to pay a reasonable tuition fee for such attendance. Said provision does not make any attempt to make it mandatory upon a Board to do this in every instance but provides that said Board shall have such authority when said requirements are met. The foregoing Act of the Legislature has not been repealed by the Legislature, neither has it been declared unconstitutional by any court and until this happens it remains the law in this state and in full force and effect.

Judge Sam C. Blair's decree referred to in your request merely found that Lincoln University did not offer the courses at said University as requested by said defendants therein and neither did Lincoln University have an appropriation sufficient to establish any of said courses of study and further found that there was no reasonable probability that said Board would establish or be able to offer any of said courses at any time in the future. The Court held in that opinion that under the equal protection clause of the 14th Amendment to the Constitution of the United States and Section 2, Article I, of the Constitution of Missouri, that plaintiff and other state supported institutions of higher learning in this state are legally obligated to admit scholastically qualified resident negro students to their divisions and curricula in which instruction is not immediately available at Lincoln University.

While in all probability the foregoing opinion of the Circuit Court of Cole County, Missouri, properly construes the law, it cannot be cited as decisive, for in this state only appellate court decisions carry that weight. However, notwithstanding this fact even if it should be controlling it would not hereinafter prevent the General Assembly of this state from appropriating funds to send colored resident students to other universities and colleges

in other states that teach courses taught at the University of Missouri, but not at Lincoln University and to pay reasonable tuition for same. So at least until such time as the General Assembly of this state shall convene and either amend or repeal Section 10779, supra, said statute is still the law in this state. However, we are further of the opinion that Section 10779, supra, leaves it within the discretion of said Board to arrange for and pay said tuition, by the Legislature merely providing that said Board shall have authority to arrange for attendance at said college or university and pay said tuition. The act does not provide that said Board shall make such arrangements and pay the tuition but gives said Board the authority to do so.

Therefore, this becomes a matter of policy with said Board, if it is the policy of said Board at Lincoln University to continue to pay such tuition it may do so when such resident students comply with all the requirements and when Lincoln University does not teach such courses as does the University of Missouri, however said Board may also refuse to pay such tuition if it so desires.

We further notice that Section 10779, supra, only allows payment of tuition at some other university or college in some other state while the appropriation Act for said tuition, now Section 7.083, H. B. #28, passed by the 65th General Assembly provides for the payment of such tuition at some institution of higher education in this state or some other state. This cannot be done; such students can only have the tuition paid by the state by attending some university or college outside of the State of Missouri as provided in Section 10779, supra. The law is well settled that to hold that such an appropriation gives said Board authority to arrange for attendance of such students at some other college or university in this state, which is contrary to the general law namely Section 10779, supra, would be legislating by an appropriation act, which the courts have repeatedly held invalid. (See State ex rel. Gaines vs. Canada, 133 S. W. (2d) 783, 342 Mo. 721.)

CONCLUSION

Therefore, it is the opinion of this department that until such time as Section 10779, Mo. R.S.A., is amended or repealed by the General Assembly of this state that the Curators of Lincoln University may make arrangements with some institution of higher education in another state for attendance of resident negro qualified students desiring to take a course or subject taught at the University of Missouri but not at Lincoln University and paid said tuition, however this is discretionary with said Board and not mandatory.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

**MUNICIPAL AIRPORTS:
CONDEMNATION:**

An easement in the space above the land, not included within a municipal airport site, for removal of obstructions to air travel to and from the landing field, cannot be acquired by the municipality by the process of condemnation apart from an easement in the real estate itself but may be so acquired as an easement in the real estate.

May 4, 1950

Honorable Raymond H. Vogel
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri



Dear Sir:

We have your recent letter in which you request an opinion of this department, which letter is as follows:

"By City Ordinance, the City of Cape Girardeau provided for a municipal airport board under Section 15126, R.S. Mo. 1939, and the board has completed the construction of a Class 3 airport by improving runways, entrances, lighting the field, etc., wherein the Civil Aeronautics Administration bore part of the cost of such construction and improvements and land acquisition.

"At the end of the NE/SW runway, there is a clump of trees. The highest of these trees is 73 feet, and most of the trees are near that height. They are located from 1400 feet to 2000 feet from the end of the runway and in direct line with the runway. For certain types of air carrier operation, the CCA requires that there be a 40 to 1 glide angle maintained. This means that there must not be any obstruction within the area of the end of a runway which cause the glide angle to be lowered. In other words, for every 40 feet of travel from the end of a runway, you may only travel up 1 foot, so that these trees reduce the glide angle to something over 20 to 1.

"The airport and the trees referred to lie in Scott County, Missouri. The City of Cape Girardeau is in Cape Girardeau County.

"May I have your opinion as to whether the city may

Hon. Raymond H. Vogel

condemn an air easement sufficient to maintain this 40 to 1 glide angle. The City knows that it can condemn the real estate, but does it have the power to leave the real estate alone and condemn only an air space easement so that the trees referred to could either be removed or topped? I wish only to have your opinion as to whether the city may remove the trees which lie 1600 feet from the runway by condemnation without condemning the real estate on which these trees grow."

The purpose of the proposed acquisition of the desired easement as fully outlined in your letter, but briefly stated, is the removal of the obstructions or hazards to air travel to and from the landing field constituted by the presence of trees located on land not included within the landing field, and being from 1400 to 2,000 feet from the end of the runway in a direct line with the runway.

You limit your inquiry to the question as to whether or not the City may condemn an air space easement sufficient to enable it to keep the point at which the trees in question are located clear of obstructions to air travel to and from the landing field and to provide as much as a 40 to 1 glide angle for aircraft travel to and from the end of the runway without condemning the real estate on which the trees are located or an easement therein.

Before answering this question we desire first to call your attention to new Section 15125, found in the Pocket Supplement of R.S.A. Mo. 1939, the old Section 15125 having been repealed by the 62nd General Assembly, page 326, Laws Mo. 1943, and a new section bearing the same number having been enacted in lieu thereof. Said new section 15125 is, in part, as follows:

"Any county, city or city under special charter shall have the power to acquire by purchase, property for an airport or landing field or addition thereto, and if unable to agree with the owners on the terms thereof, may acquire such property by condemnation in the manner provided by law under which such county or city is authorized to acquire real property for public purposes, or if there be no such law, then in the same manner as is now provided by law for the condemnation of property by any railroad corporation.

Hon. Raymond Vogel

"The term 'property' as used in this section shall mean and include any real and personal property whether privately or publicly owned or any easement or use therein, including, but not by way of limitation, * * *(Underscoring ours.)

You suggest in your letter that the City has the right to condemn the real estate on which the trees in question are located. We are of the opinion that in the light of the above quoted statute you are undoubtedly right in this conclusion.

However, you apparently draw a distinction between condemnation of an air space easement which would enable the City either to top the trees or remove them from the land, and an easement in the real estate itself.

We are of the opinion, however, that an easement which would enable the City to clear the necessary air space over the land, now occupied by the trees in question, of obstructions to air travel to and from the landing field would undoubtedly amount to an easement in the real estate on which said trees are located. In other words, the air space occupied by the trees, as well as the trees themselves, constitute a part of the real estate. In this connection we quote from Fixel on the Law of Aviation 3rd Edition, Section 47, page 55 and 56, some comments which we consider very enlightening on the subject of the ownership of the space above the land:

"The maxim that the owner of the land owns the space above the land to an indefinite height is no longer of any force.

"An owner of land may be said to own and control the airspace over his land to the height of the air usable by him either in the way of buildings or accessories of buildings estimated and fixed according to knowledge or experience deduced from usage, common sense, scientific rules and the special circumstances of the case. In U.S. v. Crosby, 66 S. Ct. 1062, the extent the owner's right in superadjacent airspace has been stated as follows:

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches

Hon. Raymond Vogel

of the enveloping atmosphere. Otherwise, buildings could not be erected, trees could not be planted and even fences could not be run * * *. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land * * *. The fact that he does not occupy it in a physical sense--by the erection of buildings and the like is not material."

We also quote from the same textbook on Aviation and from Section 54 thereof the following which we believe has direct application to the question before us:

"Air traffic rules specifically provide that except in landing and in taking-off certain minimum heights must be maintained. Low altitudes must necessarily be flown until an airplane is under way or lands, and such flights at low altitudes resulting in interference with the then existing use to which the land is put, is outside the definition of lawful flight and constitutes a trespass. This is because such flight interferes with a property right, namely, the enjoyment of property by occupants." (Underscoring ours.)

We are accordingly of the opinion that the air space occupied by the trees, mentioned in your opinion request, constitutes a portion of the real estate and that an easement in said air space cannot be condemned apart from the real estate.

However, new Section 15125, R.S.A. Mo. 1939, Pocket Supplement, page 326, Laws Mo. 1943, supra, provides that a city "shall have the power to acquire by purchase, property for an airport or landing field * * * and if unable to agree with the landowners on the terms thereof, may acquire such property by condemnation * * *."

The said section then defines the meaning of the term "property" as used therein and says that such term "shall mean and include any real and personal property whether privately or publicly owned or any easement or use therein, * * *" We comment that since the right to clear the space in question of obstructions to air travel to and from the landing field is the right sought to be acquired, undoubtedly that right so sought will, if obtained, be acquired for an airport or landing field within the meaning of the statute above quoted, and that such acquisition is therefore authorized by said section, and we comment that an easement in the real estate for that purpose is undoubtedly property within the meaning of the

Hon. Raymond Vogel

definition of the term "property" in the section.

We are of the further opinion, however, that under the provisions of said section the City of Cape Girardeau may condemn an easement in the real estate near the landing field of the airport for the purpose of clearing and keeping clear of obstructions so much of said real estate (which includes the superadjacent air space) as is reasonably required for the purpose of eliminating hazards to air traffic to and from said landing field.

CONCLUSION

We are therefore of the opinion that the city of Cape Girardeau cannot condemn an easement for an air space for the purpose of clearing away obstructions to air traffic on land near the landing field apart from an easement in the real estate, but we are further of the opinion that an easement in the real estate itself for such purpose may be acquired by the process of condemnation.

We comment that while the task of describing in the condemnation petition the exact easement sought to be condemned and the exact real estate to be subjected to said easement may require considerable particularity in the matter of specifically what is included by the necessities incident to the 40 to 1 glide angle, stipulated by the Civil Aeronautics Commission, nevertheless, the right to acquire such easement is definitely within the intendment of the statute above cited.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

SMW:mw

SAMUEL M. WATSON
Assistant Attorney General

MAGISTRATE CLERKS:

A county is authorized to pay to the clerk of a magistrate court a sum in addition to the amount paid by the state.

June 9, 1950



Mr. Raymond Vogel
Prosecuting Attorney
Farmers and Merchants Bank
Building
Cape Girardeau, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your request:

"I would like to have your official opinion with regard to the questions set out below.

"Section 2811.121 of the Revised Statutes of Missouri provides that the total salary of clerks, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this act.

"Section 2811.122 provides that in counties with a population of more than 30,000 and less than 40,000 the salary paid by the state for the magistrate clerk shall be \$1800.00 per year. This is the amount now paid to the clerk of the magistrate court in Cape Girardeau County. The

Mr. Raymond H. Vogel

magistrate of Cape Girardeau County desires to pay to the clerk out of county funds \$300.00 per year in addition to the \$1800.00 paid to the clerk by the state. You will note that the county court may provide funds for the payments of salaries and parts of salaries...in addition to the amount payable by the state under this act.

"Under this statute is the county authorized to pay an additional sum to the clerk of the magistrate court which would cause the salary of the clerk to be in excess of the amount payable by the state?"

Section 2811.121 Mo. R. S. A. 1939, Laws of Missouri 1947, Volume I, page 241, states in part:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts; provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this act. * * *"

(Underscoring ours.)

Section 2811.122 provides the amount that shall be paid by the state for the salaries of magistrate clerks, which sums are determined by population of the county and in some instances also by assessed valuation. This section fixes limits beyond which the state cannot go in making such payments. However, it appears to

Mr. Raymond H. Vogel

us that the underscored portion of Section 2811.121, quoted above, gives the county authority to pay an additional sum to the clerks of the magistrate court.

CONCLUSION

It is the opinion of this office that a county is authorized to pay an additional sum to the clerk of the magistrate court which would cause the salary of the clerk to be in excess of the amount payable by the state.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

HPW:hr

ELECTIONS: Judges of special referendum election to be selected by County Court from lists of names submitted by the committees of the political parties.

March 28, 1950

3/30/50



Senator W. R. Walker
Carrollton, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

"Does the County Court have to select the Judges of Elections from the lists of names submitted by the Political Committees.?"

We are enclosing an official opinion of this department rendered under date of February 24, 1950 to Raymond H. Vogel, Prosecuting Attorney of Cape Girardeau County, which opinion holds that the special referendum election to be held April 4, 1950 may be conducted under the provisions of Section 11682, R. S. Missouri, 1939, or Section 11482(a), Laws of Missouri, 1943, page 550.

We are also enclosing an official opinion of this department rendered under date of March 7, 1950 to Ronald J. Fuller, Prosecuting Attorney of Phelps County. This opinion holds that the County Court selects the judges for the special referendum election to be held April 4, 1950 when such election is conducted under the provisions of Section 11682, R. S. Missouri, 1939.

We believe that the provisions of Section 11502, R. S. Missouri, 1939, quoted in the enclosed opinion to Mr. Fuller, also govern the selection of judges at the special referendum election appointed under the provisions of Section 11482(a), Laws of Missouri, 1943, page 550.

Therefore, the judges who are to serve at the special referendum election to be held April 4, 1950 are to be selected from the lists submitted by the central committee

Senator W. R. Walker

March 28, 1950

of the two political parties who received the largest number of votes and the next largest number of votes in the 1948 election, that is, Republican and Democratic.

CONCLUSION

It is the opinion of this department that the judges who are to serve at the special referendum election to be held April 4, 1950 are to be selected by the county court from the lists submitted by the central committees of the Republican and Democratic parties.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED BY:

J. E. TAYLOR
Attorney General



CBB:lrt

Two enclosures

CRIMINAL PROCEDURE:

Court cannot require reporter or notary public to take deposition in behalf of indigent defendant without compensation.

May 26, 1950

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"At the request of Circuit Judge Fred E. Mueller, Division No. 4 of the St. Louis County Circuit Court, we are requesting an opinion from your office on the following questions:

"1. Does a Circuit Judge have authority to appoint either his Court Reporter or a Notary Public to take depositions on behalf of an indigent defendant who is confined in jail charged with Robbery First Degree by means of a Dangerous and Deadly Weapon and the Habitual Criminal Act, and for whom the Court had previously appointed counsel?

"2. And may the cost of such depositions be taxed as other costs?

"3. If it does have the authority, is such action discretionary or mandatory on the oral or written application of the defendant?"

We find no statute expressly applicable to the situation presented by you. Provision for depositions on behalf of defendants in criminal cases is made by Sections 4010, 4011 and 4012, R. S. Missouri, 1939. Section 4010 provides:

"When any issue of fact is joined in any criminal case, and any material witness for

Honorable Stanley Wallach

the defendant resides out of the state, or residing within the state, is enciente, sick or infirm, or is bound on a voyage or is about to leave this state, or is confined in prison under sentence for a felony, such defendant may apply to the court, or judge thereof, in which the cause is pending, for a commission to examine such witness upon interrogatories thereto annexed, and such court may grant the same upon the like proof and on the like terms as provided by law in civil cases. The court, or judge thereof, granting such commission, may permit the officer prosecuting for the state to join in such commission. The deposition of any witness confined in prison under sentence for a felony shall be taken where such witness is confined."

Section 4011 provides:

"Interrogatories to be annexed to such commission shall be settled and such commission shall be issued, executed and returned in the manner prescribed by law in respect to commissions in civil cases, and the depositions taken thereon and returned shall be read in like cases and with the like effect as in civil suits."

Section 4012 provides:

"The defendant in any criminal cause may also have witnesses examined on his behalf, conditionally, upon a commission issued by the clerk of the court in which the cause is pending, in the same cases and upon the like notice to the prosecuting attorney, with the like effect and in all respects as is provided by law in civil suits: Provided, that the notice in such case to the prosecuting attorney shall state the name or names of the witness or witnesses whose depositions are desired or will be taken."

The procedure under what is now Section 4012 was discussed in the case of *Ex parte Welborn*, 237 Mo. 297, 1. c. 302, as follows:

" * * * The right to take depositions in criminal cases is statutory and the statute required

Honorable Stanley Wallach

no affidavit or written application. Since the defendant may have witnesses examined, conditionally, in his behalf exactly as in civil cases (Sec. 5173, R.S. 1909), save that a commission must issue, and since in civil cases a party to a pending suit 'may obtain the deposition of any witness, to be used in such suit, conditionally,' (Sec. 6384, R.S. 1909), the commission under section 5173 issues on demand as a matter of right, without any preliminary showing.

"The deposition of any, consequently every, witness may be taken, and the sole prerequisite to the issuance of a commission under section 5173 is that defendant desires one and asks for it. An affidavit or written application setting forth such desire could serve no useful purpose. The Legislature saw no reason for it and neither do we.
* * *

Section 1920, R. S. Missouri, 1939, dealing with depositions in civil proceedings provides that depositions, if taken in this state, may be taken by one of the following officers, " * * * some judge, justice, justice of the peace, notary public or clerk of any court having a seal, in vacation of court, mayor or chief officer of a city or town having a seal of office; * * *."

In the case of Watkins v. McDonald, 70 Mo. App. 357, l. c. 362, the court discussed the matter of compensation of commissioners appointed to take depositions in civil proceedings as follows:

" * * * This act neither fixes the compensation of the officer empowered thereunder to take depositions, nor provides how or by whom it shall be paid. It cannot be intended that the duties imposed by an appointment under this statute should be gratuitously performed. It necessarily results that upon the rendition of such services the commissioner to take depositions is entitled to a reasonable compensation, which must be determined by the court appointing him, in view of all the facts and circumstances attending the performance of his duties. In making such allowance in the present case, the court should have assessed the proper amount for the services of the commissioner and his stenographer, the parties having agreed that the stenographer

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should be employed, and should have ordered the sum so fixed to be taxed as a part of the general cost, at the end of the litigation. * * * Within the limits furnished by those analogous employments, and in view of the circumstances and facts showing what was done by the commissioner and his stenographer in this case, the court in the exercise of a just discretion should have fixed a reasonable compensation. Commissioners are not deprived of adequate protection by this ruling. If they choose to serve when appointed, they can take proper steps to secure their fees, either by stipulation between the parties, or by motion for security for costs.
* * *

The right of the defendant to take depositions in a criminal case has no constitutional source such as the right to compulsory process for the attendance of witnesses and the right to counsel. (See Section 18(a), Art. I, Constitution of Missouri, 1945.)

Section 4003, R. S. Missouri, 1939, expressly provides that the court shall appoint counsel for an indigent defendant in a criminal proceeding. The courts have held that attorneys appointed under this section are not entitled to receive compensation in the absence of any provision therefor by the Legislature. In the case of Kelley v. Andrew County, 43 Mo. 338, 1. c. 341, the court stated:

"The constitution of the State (art. I, section 18) provides 'that in all criminal prosecutions the accused has the right to be heard by himself and his counsel;' and by the statute (Gen. Stat. 1865, ch. 212, Sec. 4) it is enacted that 'if any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours.' These provisions, no doubt, are quite in accordance with the spirit and principles of our Christian civilization, and deserve to be liberally construed and generously carried into effect, for the amelioration of the condition of the class thereby intended to be benefited. But these reflections do not materially contribute to the solution of the particular question

Honorable Stanley Wallach

before us. Chandler has had and enjoyed the fullest benefit of the benevolent provisions of the law in his behalf; but the Legislature has failed to make any provisions for the pecuniary compensation of those who, under the appointment of the court, rendered him service. It is at least within the range of a reasonable conjecture that this omission was intentional; that the statute in behalf of the friendless and destitute who are charged with crime was framed upon the idea that members of the legal profession, in the interests of humanity and as an honorary and humane duty, would for such persons, under such circumstances, on the appointment of the court, render their professional services and skill without fee or pecuniary reward; and that has been the practice in this and other States; and the fact is significant that this is the first case of the kind that has appeared upon the record of the court in the whole course of our judicial history. The practice has been so uniform, general, and long continued, that it might, perhaps, be regarded as an established professional usage or custom, so that those who assume such service may be understood as undertaking it gratuitously and without reference to pecuniary profit."

The right to counsel being a constitutional right afforded the defendant, we do not feel that the cases requiring an attorney to act on behalf of a defendant without compensation are analogous to the situation here involved. There is neither law nor custom which requires a person to whom a commission to take depositions is directed to proceed to take the depositions without assurance of compensation. In the case of *Trail v. Somerville*, 22 Mo. App. 308, the court discussed the question of compensation of a referee as follows (22 Mo. App. 308, l.c. 313):

"Upon the whole, we are of the opinion that a referee in this state is in no better position in respect of his costs than any other officer of the court. He is entitled to the same remedies which are accorded to them, and has the further advantage over them of being able to protect himself, by declining the reference, or by requiring the parties, as a condition of his entering upon the discharge of its duties, to secure the payment of his compensation. * * *" (Underscoring ours.)

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A notary public would, we feel, be in the same situation as a referee in regard to his services. He is not, as is a lawyer, an officer of the court. A court reporter is an officer of the court. (State ex rel. v. Hitchcock, 171 Mo. App. 109, 153 S.W. 546.) However, a court reporter as such is not authorized to take depositions. (Section 1920, R. S. Missouri, 1939, supra.) He would have such authority only if he is a notary public. Assuming that he is a notary public, the taking of depositions on behalf of indigent defendants is not a duty imposed upon him either by law or custom. His duty in such respect, therefore, would differ from that of a lawyer in defending indigent defendants. The legislature has seen fit to require the court reporter to prepare a transcript upon appeal for a defendant who is unable to pay the cost of such transcript. (Section 13344, R. S. Missouri, 1939.) However, the Legislature has not seen fit to impose upon the court reporter the duty of taking depositions.

Therefore, our answer to your first question is that a circuit judge does not have the authority to require either a notary public or his court reporter to take depositions on behalf of an indigent defendant in a criminal proceeding. Under Section 4012, R. S. Missouri, 1939, supra, and the case of Ex parte Welborn, supra, the defendant is entitled to the issuance of a commission upon application, either oral or written, but there is no method by which the court could force a notary public or his court reporter to accept and execute the commission without provision for his compensation.

As for your second question, in the event that the commission should be accepted and executed, the costs of the depositions could properly be taxed as other costs. In the case of State v. Krueger, 69 Mo. App. 31, the court held that the costs of depositions taken on behalf of the defendant in criminal proceedings may properly be taxed as costs.

As for your third question, we have concluded that there is no authority vested in the judge to require a notary public or his reporter to take depositions on behalf of an indigent defendant, and, therefore, there would be no question as to whether or not the court has discretion in the exercise of its authority.

CONCLUSION

Therefore, this department is of the opinion that a circuit judge does not have authority to require his court reporter or a notary public to take depositions in behalf of an indigent defendant for whom the court had previously appointed counsel where no

Honorable Stanley Wallach

provision is made for the compensation of the reporter or notary public in taking the depositions.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RECORDER) Plats may be recorded by photostating in first-class
) counties.

December 12, 1950

12/12/50

FILED
93

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In the Recorder of Deeds Office in this County it is proposed that it would be economical and timesaving to photostat recorded plats. We have been requested to secure an opinion from you as to the legality of such photostating of records, or if there is any prohibition in the law against same."

Section 12807, R. S. Missouri, 1939, provides:

"It shall also be the duty of the recorder to record all plats delivered to him for record, in a book to be called a plat book, and, when necessary to preserve uniformity, he shall reduce the scale of the original plat, and on each copy so made he shall indorse the following certificate under his hand: 'This plat is truly copied from the original. (Signed) _____, recorder.'

Copies of the record of plats from said plat book, properly certified under the hand and official seal of the recorder, shall be evidence in all courts of justice."

Honorable Stanley Wallach

Section 13166, Laws of 1945, page 1426, provides:

"In all cities in this state which now have or which may hereafter have or contain 600,000 inhabitants or more and in all counties in class one, the recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, by writing them, word for word, in a fair hand, or by typewriting them or by photostating them, noting at the foot of such record all interlineations and erasures, and the words visibly written on erasures, and noting, at the foot of the record, the day and times of the day, month and year when the instrument so recorded was delivered to him, or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered. Except when otherwise provided by law it shall be the duty of the recorder to deliver to the person holding his receipt therefor every instrument so recorded within sixty days from the date upon which it was presented for recording."

Section 13188, R. S. Missouri, 1939, provides:

"Wherever the statutes require deeds, mortgages, conveyances, deeds of trust, bonds, covenants, documents, marriage contracts, certificates of marriage, commissions, official bonds, statements, records, plats, surveys, schedules, papers, patents, or other instruments of writing to be recorded, the making of photographic copies of such deeds or other instruments of writing shall be deemed recording within the meaning of this chapter. Such photographic

Honorable Stanley Wallach

copies shall be bound, paged and indexed wherever it is so provided for deeds or other instruments recorded by hand, and such photographic copies when bound together shall be deemed record books within the meaning of this chapter."

We feel that under the above-quoted statutory provisions plats may be recorded in your county by photostating. Section 13166, which is applicable to first-class counties, the class to which St. Louis County belongs, provides for the photostating of certain specified instruments but does not specifically refer to plats. Section 13188, providing for the recording by the making of photographic copies, expressly includes plats. This section is applicable generally to all counties. It was originally enacted in Laws of 1917, page 441. Section 13166 was originally found in Laws of 1933 at page 362. We do not feel that the Legislature, by omitting the word "plat" from Section 13166 as originally enacted, intended to exclude such instruments from the class of instruments which might be photostated in certain of the larger counties. It will be noted that Section 13166 refers to deed, mortgage, etc., "or other writing." Section 13188 lists plats specifically and in the second reference to the copying of such instruments uses the language, "such deeds or other instruments of writing." Thus, in this section the Legislature included plats in the term "other instruments of writing," and we think that the "other writing" referred to in Section 13166 would likewise include plats.


CONCLUSION

Therefore, it is the opinion of this department that in St. Louis County, a county of the first class, plats may be recorded by photostating.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General



J. E. TAYLOR
Attorney General

RRW/feh

BUILDING AND LOAN: Association may not have both an undivided profits and unallocated reserves account.

February 28, 1950

2/28/50

Mr. Clarence Webb
Supervisor, Division of
Savings and Loan Supervision
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion upon the following matter:

Under Section 39 of the Savings and Loan Law may an association maintain both an undivided profits account and unallocated reserves account.

Section 35, Laws of Missouri, 1945, page 1578, Section 8257.34, M.R.S.A., provides as follows:

"The board of directors of each association shall set up and maintain the reserves required, and may maintain such additional reserves as are permitted, by this Act. The board shall make semi-annually from net earnings or undivided profits appropriations for reserves required by law and such additional appropriations, if any, as may be deemed advisable by the board for the protection of the association."

Section 36, Laws of Missouri, 1945, page 1578, Section 8257.35, M.R.S.A., provides, in part, as follows:

"Each association shall accumulate from its net earnings and maintain a contingent fund (which may also be termed general reserve) for the sole purpose of absorbing losses. On the semi-annual closing dates, each association shall, before declaration of any dividend for such semi-annual period,

Mr. Clarence Webb

transfer to such fund or reserve an amount not less than ten per cent of its net earnings for such semi-annual period. * * "

Section 38, Laws of Missouri, 1945, page 1578, Section 8257.37, M.R.S.A., reads as follows:

"On each semi-annual closing date, after payment or provision for payment of all expenses and transfers to reserves, the remainder of net earnings shall be credited to the undivided profits account."

Section 39, Laws of Missouri, 1945, page 1578, Section 8257.38, M.R.S.A., which is mentioned in your request and was a part of the Senate Committee Substitute for Senate Bill No. 65, passed by the 65th General Assembly, states:

"The association may, at its option, designate the undivided profits account as unallocated reserves. * * *"

Section 40, Laws of Missouri, 1945, page 1578, Section 8257.39, M.R.S.A., reads as follows:

"As of June 30 and December 31 of each year the board of directors shall declare such dividend, if any, from the undivided profits account as the board shall deem advisable, taking into consideration existing conditions; provided however that any association which, upon the effective date of this Act, had been closing its books and declaring dividends upon other semi-annual dates may continue to do so, with the consent of the supervisor."

Under the above statutes, it will be seen that the Savings and Loan Association is required to set up a contingent fund which is to be used for the purpose of absorbing losses, and that such contingent fund may, in the discretion of the Board of Directors of the Association, be designated as a general reserve fund. Further, the association is required to provide an undivided profits account, but permission is given to the association to designate such undivided profits account as unallocated reserves.

We believe, from a reading of the statutes, that it was the intent of the Legislature that the association had its

Mr. Clarence Webb

choice as to what name should be applied to the two funds. The contingent fund could be designated as a general reserve fund, while the undivided profits account could be called unallocated reserves. The reason for giving to the association its choice as to the appellation that could be applied to the fund out of which dividends were to be paid was that the term "undivided profits" might lead a shareholder to believe such account was available and should be paid out in dividends in its entirety, while the term "unallocated reserves" would indicate that a part of said fund is being held in reserve, "taking into consideration existing conditions," as authorized in Section 40, supra. We do not believe the Legislature intended that both the undivided profits account and unallocated reserves account could be maintained by the association, but merely gave to the association its choice as to names, the fund remaining the same no matter by what name it was designated.

CONCLUSION

It is, therefore, the opinion of this department that a Savings and Loan Association may not maintain both an undivided profits account and an unallocated reserves account.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ml

SAVINGS AND LOAN:
DISTRIBUTION OF MONEY DUE
LIQUIDATED SAVINGS AND
LOAN ASSOCIATIONS CONSISTING
OF REFUNDS OF INSURANCE
PREMIUMS GROWING OUT OF
INSURANCE RATE LITIGATION
IN UNITED STATES COURT:

Money found by United States Court in insurance rate litigation to be due to certain liquidated building and loan associations being in the nature of premium refunds cannot be distributed according to provisions of Section 82a of S.B. 65, 65th General Assembly but will be escheatable to State of Missouri as unclaimed by the unknown owners within five years of the ruling of the court finding said money to be due to said liquidated savings and loan associations.

June 20, 1950

Honorable Clarence Webb
Supervisor, Division of Savings
and Loan Supervision
State Office Building



Dear Sir:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"We are in receipt of a request from Mr. James E. Goodrich a Kansas City Attorney who was appointed by the United States District Court for Central Division of the Western District of Missouri, as Custodian in connection with the insurance rate litigation pending in the court, for information as to the question as to whom he should pay certain refunds, which have been adjudged to be due to some Savings and Loan Associations which have been liquidated and are not now in existence.

"The sums of money owing to said non-existing Savings and Loan Associations are very small, varying from sixty-five cents to three hundred and thirty-eight dollars and fifty-two cents and amounting to a total sum of only six hundred and fourteen dollars and ten cents. Mr. Goodrich has assumed that the records in our office will disclose the names of the persons who are entitled to receive these refunds and that we can tell him how to distribute said funds.

"In view of the inquiry directed to us by Mr. Goodrich and in view of the facts above set forth we have given some consideration to

the matter and it seems to us that the funds could be distributed pursuant to the provisions of Section 82A of Senate Bill 65, passed by the Sixty-Fifth General Assembly. We desire an opinion from your office, first, on the question as to whether or not such fund can be distributed pursuant to the provisions of the above mentioned Senate Bill. In the event that your answer to that question is in the negative we then desire your opinion as to whether or not, when a refund of a portion of an insurance premium or portions of more than one insurance premium is the property of a liquidated Savings and Loan Association such refund should be paid to the surviving stockholders of the association.

"If your opinion is that such refunds should be paid to the surviving stockholders of the liquidated associations we comment that this department does not have in its files lists of such stockholders and that it lacks the facilities to obtain such lists and we would therefore like for your opinion to cover the question as to whether this department is under any obligation to assist the Custodian appointed by the court in the solution of the problems involved in the distribution of these funds."

You ask whether or not sums of money constituting insurance premium refunds found by the United States District Court to be due to certain savings and loan associations which associations have been liquidated and out of existence for years can be distributed in accordance with the provisions of Section 82(a) of S.B. 65, 65th General Assembly. In your above quoted opinion request it is indicated that there is nothing in your files from which information as to the names of the former stockholders in said liquidated building and loan associations can be ascertained and that you lack facilities for making an investigation in order to inform yourself as to the names and addresses of such persons.

The pertinent portion of said Section 82(a) of S.B. 65, 65th General Assembly is as follows:

"If upon final liquidation and dissolution of an association, * * * any amount held by such association is distributable or payable to a member or other person whose address is unknown and cannot be ascertained within one year, such amount shall be paid to the supervisor, who shall make application to the circuit court of the county in which the principal office of said association is or was located for

Hon. Clarence Webb

an order designating a bank or trust company in such county in which all such monies may be deposited to the credit, respectively, of all such members or other persons, or the legal representatives thereof. A compliance with the terms of such order shall be a full discharge of all liability upon the part of the association to each such member or other person for the amount so distributable or payable. The amount of each such deposit shall be paid by the bank or trust company to the person to whose credit the deposit was made in the same manner and under the same conditions as if the deposit had been made personally by such person."

We are of the opinion that the above quoted section is not applicable to the conditions described in your letter for the reason that said section is especially designed for the accomplishment of the purpose of providing a way to dispose of sums of money due to unknown owners of portions of the assets of savings and loan associations in the process of liquidation and at the time that the liquidation is accomplished and that it does not contemplate distribution of sums of money accruing to the building and loan associations by virtue of refunds ordered by the court after liquidation has been completed.

Furthermore, we are of the opinion that Section 1 of an Act entitled Escheats, Gifts and Devises to the State, page 298, Laws Mo. 1947, is applicable to the facts involved in your opinion request.

Said Section 1 of said Act is as follows:

"After the owner, his assignee, personal representative, grantee, heirs, devisees or other successors, entitled to any moneys, refund of rates or premiums or effects by reason of any litigation concerning rates, refunds, refund of premiums, fares or charges collected by any person or corporation in the State of Missouri for any service rendered or to be rendered in said state, or for any contract of insurance on property in this state, or under any contract of insurance performed or to be performed in said state, which moneys, refund of rates or premiums or effects have been paid into or deposited in connection with any cause in any court of the State of Missouri or

Hon. Clarence Webb

in connection with any cause in any United States court, or so paid into the custody of any depository, clerk, custodian, or other officer of such court (whether the same be afterwards transferred and deposited in the United States Treasury, or not) shall be and remain unknown, or the whereabouts of such person or persons shall be and has been unknown, for the period heretofore, or hereafter, of five successive years, or such moneys, refund of rates or premiums or effects remain unclaimed for the period heretofore, or hereafter, of five successive years, from the time such moneys or property are ordered repaid or distributed by said courts, such moneys or property shall be escheatable to the State of Missouri, and shall be escheated to the State of Missouri in the manner hereinafter provided, with all interest and earnings actually accrued thereon to the date of the judgment and decree for the escheat of the same." (Underscoring ours)

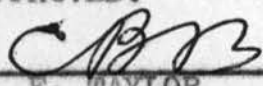
We suggest the fact that the money referred to in your letter comes squarely within the provisions of the last quoted section said money constituting refunds of insurance premiums ordered by the United States court in insurance rate litigation and that the stockholders of the liquidated savings and loan associations involved are unknown owners and we are of the opinion that if they do not claim these funds within the statutory period of five years mentioned in said section said funds will be escheatable to the State of Missouri.

CONCLUSION

We are accordingly of the opinion that the custodian appointed by the United States court should hold these funds of these unknown owners until either the owners establish their right to same or until he has held such funds for the above mentioned statutory period of five years, after which time said funds will be escheatable to the State of Missouri.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

SAMUEL M. WATSON
Assistant Attorney General

SMW:mw

CRIMINAL LAW: Venue in a case of obtaining money under false pretenses lies in the County wherein the money is actually obtained.
VENUE: When checks are involved the money is obtained when the check is charged to the account of the drawer of said check, except when the said check is transmitted through the mails, in which case venue would lie in the County wherein the letter was mailed.

January 27, 1950

Hon. Joe C. Welborn
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri



1/31/50

Dear Mr. Welborn:

We have your recent letter requesting an official opinion of this department. Your opinion request is as follows:

"I would like an official opinion of your department as to the venue in a case of a state employee defrauding the state by means of a "padded" expense account. The expense account is mailed to Jefferson City at regular intervals, from an outstate county. The account is approved, and the check is mailed from Jefferson City."

The sole question presented in your opinion request is:

Where does venue lie in a case of a state employee defrauding the State by "padding" his expense account, said expense account being mailed from an outstate county to Jefferson City, where it is approved and the check in payment of same is then mailed to said outstate county from Jefferson City?

Section 3767, Mo. R. S. A. provides:

"Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

Hence in order to determine where the venue lies in the case here at hand it is necessary for us to first determine in which county the offense was committed. The expense account was made up in an outstate county and thence mailed to Jefferson City where the said expense account was approved and then in reliance upon the statements made and submitted in the said

Hon. Joe G. Welborn

expense account a check was drawn by the State in favor of said employee and thence mailed to him in the outstate county.

There are two rules either of which may be applied to establish the venue of the case here at hand under the facts submitted in your opinion request.

The first of these two rules is stated in 22 C.J.S., Criminal Law, Section 185 (n) page 287, as follows:

"The general rule is that the crime of obtaining money or property by false pretenses is completed where the money or property is obtained, and that, if the pretenses are made within one jurisdiction and the money or property is obtained in another, the person making the representations must be indicted within the latter jurisdiction, * * * * *"

The above quoted rule was applied by the Supreme Court of Missouri in the case of State v. Mandell, 183 S. W. 2d 59, wherein the court held that the prosecuting witness did not part with her money until the checks were charged to her account. The following quote appears therein on page 64:

"* * * * * In the case before us Mrs. Springer parted with her money in the City of St. Louis when the checks were charged to her account. Until that occurred she had full dominion over it. A case in point is Raymond v. State, 116 Tex.Cr.R. 595, 33 S.W. 2d 192. It was there held in a prosecution for obtaining money under false pretenses that the venue was in Shackelford county. The check upon which the money was obtained was drawn on a bank in Shackelford county but cashed by the defendant in a bank in Tarrant county. The exact situation as that in the case before us. We rule that the venue of the crime was in the City of St. Louis. * * * * *"

It follows therefore that the county wherein the drawee bank

Hon. Joe G. Welborn

was located, and by which said bank the check was ultimately paid, would be the county where the State had parted with its money. Hence, venue in this instance would lie in that county.

The second rule which may be applied to the facts recited in your opinion request in order to ascertain wherein the venue of such case would lie is stated in 22 C.J.S., Criminal Law, Section 185 (n), page 287, as follows:

"Where, induced by false pretenses, one transmits by mail to accused money, drafts, or other writings, such mailing is a delivery to the postmaster as the agent of accused, to be forwarded to him, and the offense is complete where the letter is mailed, and is indictable at such place;
* * * * *"

No cases were found in this jurisdiction in which the above quoted rule was applied. However, the above quoted rule was applied in the case of *People v. Megladdery*, 105 P. (2d) 385 wherein the court said on page 390:

"The appellant urges that the court had no jurisdiction over the offense set forth in the fourth count because the check involved in that count was written in Sacramento and there mailed to the payee addressed to Oakland. Such was the testimony of the appellant but other witnesses gave conflicting testimony from which the jury could have found that the check was mailed in Alameda county. * * * *"

Applying the above quoted rule to the facts here at hand it is readily seen that the venue in this instant would lie in that county wherein the check was mailed, namely, Cole County.

CONCLUSION

It is, therefore, the opinion of this department that the venue of the charge of obtaining money by false pretenses

Hon. Joe C. Welborn

against a state employee, for a fraudulent expense account mailed to Jefferson City from an out-state county and a check for payment of the same being mailed to said state employee from Jefferson City, would be either in that county wherein the said drawee bank was located and by which said bank the check was ultimately paid; or in that county wherein the said check was mailed to the said state employee, which in this instance would be Cole County.

Respectfully submitted

PHILIP M. SESTRIC
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL *JET*

PMS:A

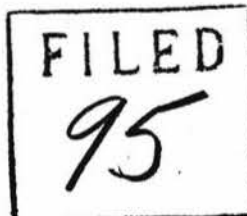
TAXATION

) Property owned by Veterans' organization exempt from taxation
) if used only for organization meetings, and not for social
) or other activities, and if organization is engaged in
) permanent, fixed projects of charitable nature.

February 10, 1950

2-11-50

Honorable William H. Wessel
Prosecuting Attorney
Gasconade County
Hermann, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Is a Veteran's Organization, such as Veterans of Foreign Wars of The American Legion, exempt from paying taxes on an Organization owned Lodge Building, used only for purposes of holding meetings of the lodge which owns said building?"

Section 6, Article X, Constitution of Missouri, 1945, provides:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article shall be void."

Section 5, Laws of Missouri, 1945, page 1799, provides in part:

"The following subjects shall be exempt from taxation for state, county or local

Honorable William H. Wessel

purposes: * * * Sixth, all property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

If the property of veterans' organizations is to be exempt from taxation, the only available exemption is that applicable to property actually and regularly used for purposes purely charitable and not held for private or corporate profit. We presume that the property in question is not held for private or corporate profit, otherwise, no question of exemption could arise. The question is, therefore, whether or not property owned by veterans' organizations, is actually and regularly used for purposes purely charitable.

We find no cases either in this state or in other states in which the question of exemption from taxation of property owned by veterans' organizations has been considered.

In the case of Salvation Army v. Hoehm, 354 Mo. 107, 188 S.W. (2d) 826, at l. c. 830, the meaning of "charity" for the purpose of exemption from taxation was set forth as follows:

"Probably the most comprehensive and carefully drawn definition of a charity that has ever been formulated is that it is a gift, to be applied consistently, with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the

Honorable William H. Wessel

burdens of government. * * * A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering under special diseases, for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public.' * * * "

In the case of *In Re Burroughs' Estate*, 206 S.W. (2d) 340, the question involved was whether or not a devise of property to a trustee, with directions to erect a building for Masonic purposes only, was exempt from inheritance tax under Sections 576 and 602, R. S. Missouri, 1939, which provide exemption for transfers of property to be actually used solely for charitable purposes. The court held the devise exempt from inheritance tax. The court in its opinion considered largely cases in which the liability of property owned by Masonic Orders to taxation was involved, and the decision of the court is, we feel, helpful in the present situation.

The court dismissed the facts presented as follows: (206 S.W. (2d), 1. c. 343)

" * * * This agreed statement of facts discloses that no activity of the Masonic Orders in Mexico has the slightest tinge of commercialism. The charter does not authorize those Masonic Orders to engage in any activity through which any individual would obtain any financial benefit or gain. The agreed statement of facts does show that the lodges at Mexico aid the parent or Grand Lodge in permanent, fixed and continuous projects of a charitable nature; for example, the Masonic Home of Missouri where indigent Masons, widows and orphans of Masons are provided with a home. Contributions to maintain this home are mandatory upon the subordinate lodges and chapters. Does the fact that the

Honorable William H. Wessel

building to be erected by the trustee is to be used for holding lodge meetings and teaching Masonry and its principles, as indicated by the agreed statement of facts, defeat the exemption here claimed? * * *

(Underscoring ours.)

The court answered its question as follows: (206 S.W. (2d), 1. c. 343)

"After careful consideration of this question and after reading many cases we conclude that the property devised to the trustee in this case, for the purpose of erecting a Masonic Temple to be used exclusively by the Masonic bodies of Mexico, Missouri, for Masonic purposes only must be exempt from the inheritance tax. * * *

"In *Fitterer v. Crawford*, 157 Mo. 51, loc. cit. 63, 57 S.W. 532, 535, 50 L.R.A. 191, this court said: 'Our conclusion is that Masonic lodges are organized for charitable and benevolent purposes, with no incentive to private or corporate gain, but whose revenues derived from whatever source they may be, are applied to the payment of their current expenses, and the relief of their afflicted and needy members and their families, and, although their charity is restricted to such use, they are charitable institutions.'

"Many cases from other states have held that the Masonic Lodge is a charitable institution and exempt from taxation if the property sought to be exempted is being used exclusively for Masonic purposes.
* * *

The court further stated at 206 S.W. (2d) 1, 1. c. 344:

" * * * In the case of *Ancient & Accepted Scottish Rite of Freemasonry v. Board of County Com'rs*, 122 Neb. 586, 241 N.W. 93, loc. cit. 97, 81 A. L. R. 1166,

Honorable William H. Wessel

the Supreme Court of Nebraska had the following to say: 'And so, while it is a well-settled general rule that exemptions from taxation are to be strictly construed, and their operation is never to be extended by construction, the power and the right of the state to tax are always presumed, and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the legislature, but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. 25 R.C.L. 1093, section 309.'

"We deem the above language appropriate to the situation before us. We are strengthened in our view by the wording of our constitution and statute above referred to wherein both read in substance that all property, real and personal, not held for private or corporate profit and used exclusively for charitable purposes may be exempt from taxation. We realize that financial profit for gain is not always the real test. In the case before us there is no suggestion of any commercialism. This court in the case of St. Louis Lodge, No. 9, B.P. O.E. v. Koeln, 262 Mo. 444, 171 S.W. 329, L.R.A. 1915C, 694, Ann. Cas. 1916E, 984, denied exemption from taxation on a building that was used by the Elks Lodge for lodge purposes. All of the profits of the lodge were given to charity but this court pointed out that no fee was charged for entrance to shows, dances, billiards or cards all of which were furnished in the building to members at the expense of the lodge. The court held the charitable purposes were secondary and incidental; that the main purpose of the lodge was to furnish social entertainment for its members. * * *"

Honorable William H. Wessel

In view of the decision in the Burroughs' case, we feel that the property of a veterans' organization would be exempt from taxation only if used exclusively for activities of the organization and no other activities, social or otherwise, and furthermore, only if the organization is engaged in "permanent, fixed and continuous projects of a charitable nature." If, however, the profits of the organization are given to charity, but the organization furnishes activities to its members in the building, such as shows, dances, billiards or cards, at the expense of the organization, then, we feel that the holding in the case of St. Louis Lodge No. 9, B.P.O.E. v. Koeln, 262 Mo. 444, 171 S.W. 329, referred to in the quotation from the Burroughs' case, supra, would apply, and the property would not be exempt from taxation.

Thus, the question of exemption must depend upon the actual use to which the property is put and the activities of the organization. In your letter you state that the building is used only for the purpose of holding meetings of the organization which owns the building. If such is the exclusive use to which the building is put, we feel that one of the conditions of the Burroughs' case has been met. However, you give us no information concerning the charitable activities carried on by the organization. In order to be entitled to exemption, there must be a further showing that the organization is engaged in "permanent, fixed and continuous projects of a charitable nature." If the organization is engaged in such charitable activities, and the building is used exclusively for meetings and not used for social or other activities, then, we feel that the property is exempt from taxation. All of these factors must be present, however, for the exemption to apply.

CONCLUSION

Therefore, it is the opinion of this department that property of a veterans' organization is exempt from taxation only if it is used exclusively for purposes of the organization and not for social or other activities, and if the organization is engaged in "permanent, fixed and continuous projects of a charitable nature." The right to exemption must depend upon the facts of each particular case.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW/feh

ROADS AND BRIDGES) Cost of right of way for new road within special
) road district is borne either by petitioners for
) establishment of road or county, or both.

February 16, 1950

2/17/50

Honorable William H. Wessel
Prosecuting Attorney
Gasconade County
Hermann, Missouri



Dear Sir:

We have received your request for an opinion of this department on the following question:

"I. Does the County Court have to pay for a Right of Way, establishing a new road, if this Road is not being built by the State Highway Department, but is being built by the Commissioners in a Special Road District?"

Sections 8473 to 8478, R. S. Missouri, 1939, vest in the county court exclusive authority to establish public roads within their respective counties. (State ex rel. Lane v. Pankey, 221 S.W. (2d) 195). We presume that the establishment of the road in question has been or will be in accordance with those provisions. Payment for the right of way is determined under Section 8475, which reads as follows:

"When the petition required by section 8474 of this article is presented, upon proof of this notice having been given as required by section 8474, and if no remonstrance, as herein mentioned, is presented, and if the petitioners give the right of way for said proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by landowners through whose land said proposed road would run, the court must, without discretion to do otherwise, open said road and the court shall thereupon proceed as in this section hereinafter provided in cases where upon a hearing the court finds it necessary to establish a road; and if a remonstrance be, presented, signed by twelve or more freeholders re-

Honorable William H. Wessel

siding in the municipal township or townships through which it is proposed to establish said road, three of whom shall reside in the immediate neighborhood, the court shall hear such witness as the respective parties may produce in regard to the public necessity, practicability and probable damages, if any claimed, to the owner of the land through which it is proposed to establish said road, and the expense of establishing and building same, including bridges and culverts therein; and if the court, upon the hearing, shall find the facts in the case do not justify the establishing of the road at the expense of the county or of the petitioners, the proceedings shall be dismissed; but if the court upon said hearing shall find the facts do justify the establishing of said road, either at the expense of the county or of the petitioners, or both, it shall make an order accordingly. If the court finds it necessary to establish said road at the expense of the county, or if it be found necessary to establish same either wholly or partly at the expense of the petitioners and said petitioners pay into the county treasury, on or before a time to be fixed by the court, the probable amount of damages, ascertained as aforesaid, or a sum to be fixed by the court, to the use of the owners of said lands, then, in either event, the court shall make an order directing the county highway engineer, within sixty days thereafter, to view, mark out and survey such road, take all relinquishments of the right of way of those who will give the same, and take the names of all owners of land, through which said road may run, and who have not given or will not give the right of way, and the amount of damages claimed by each one separately, together with a description by section and subdivision thereof of the lands of each owner sought

Honorable William H. Wessel

to be taken, and also the engineer's estimate of the cost of bridges, culverts and grading that may be necessary upon such road, and shall report his proceeding in the premises, together with his survey and plat of said road, to the court within the time last above provided. If it shall appear from said report that the right of way has been secured, and deeds therefor filed, or that the damages claimed do not exceed the amount offered by the court or deposited by the petitioners as aforesaid, or both, the court shall order the road established. All relinquishments, deeds and plats of said roads shall be by the highway engineer filed in the office of the county clerk and shall be preserved as public records, and all such deeds shall be filed and recorded in the office of the recorder of deeds."

We find no provision in either Article 10 or Article 11 of Chapter 46, R. S. Missouri, 1939, pertaining to special road districts, which makes other provision for the payment of the cost of right of way in new roads established by the county court within such special road districts. Therefore, Section 8475 is the applicable section insofar as new roads within such districts are concerned. That section provides that either the petitioners shall pay into the court the amount of damages for right of way, or the right of way shall be acquired at the expense of the county.

CONCLUSION

Therefore, it is the opinion of this department that under Section 8475, R. S. Missouri, 1939, upon the establishment of a new road within a special road district, the costs of the right of way for such road must be paid by either the petitioners for the establishment of such road or at the expense of the county, if the county court, upon hearing, finds that the facts justify the establishing of such road at the county's expense, or partly at the expense of the petitioners and partly at the expense of the county.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

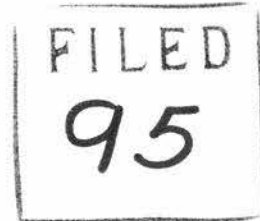
J. E. TAYLOR
Attorney General

RRW/feh

PROBATE COURTS:

Persons signing administrator's bond as attorney in fact for surety may act as appraiser of estate for inheritance tax purposes.

February 27, 1950



Honorable Joe C. Welborn
Attorney at Law
Bloomfield, Missouri

Dear Mr. Welborn:

This department is in receipt of your recent request for an official opinion. This request is as follows:

"The Probate Judge has asked me to write you for an opinion on the question whether or not a person who signs an administrator's bond as Attorney in Fact for the surety, may also act as appraiser for State Inheritance Tax purposes.

"I will appreciate an official opinion from your office as soon as convenient."

Section 585, Laws Missouri 1945, page 70, provides for the appointment by the probate court of appraisers of estates for inheritance tax purposes. This section reads in part as follows:

"* * *If it appear that said estate may be subject to such tax, it shall be the duty of the court to * * * appoint some qualified tax-paying citizen of the county, who is not executor, administrator or beneficially interested in said estate or the attorney for any of such parties, as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this act. * * *" (Underscoring ours.)

The attorney in fact who signs an administrator's bond for the surety is not, of course, the executor or administrator, and we assume that he is not acting as attorney for the executor, administrator or anyone beneficially interested in the estate. The only question to be determined then is whether or not a person who merely signs an administrator's bond as attorney in fact for the

Honorable Joe C. Welborn

surety is beneficially interested in said estate so as to prevent his appointment as appraiser of the estate under Section 585, supra.

An attorney in fact is one who is given authority by his principal to do a particular act not of a legal character; Treat v. Tolman, 113 F. 892, 51 C.C.A. 522. In this instance, we assume that the attorney in fact had only the authority to sign the bond for the surety. After the signing of the bond, he owes no further duty to his principal, nor has he any liability under the bond. The only interest he could possibly possess is that same interest which his principal surety has in the estate, that interest being the proper performance by the administrator of his duty regarding the estate. And the surety would have no reason to have any other interest in the appraisement of the estate for inheritance tax purposes except that it be proper and valid.

We fail to find where the attorney in fact has any beneficial interest in the estate which would preclude him from qualifying as appraiser of the estate for inheritance tax purposes.

CONCLUSION

It is therefore the opinion of this department that a person who signs an administrator's bond as attorney in fact for the surety does not have, by reason of acting as such attorney in fact, such a beneficial interest in the estate so as to preclude him from qualifying as appraiser of the estate for inheritance tax purposes.

Respectfully submitted,

RICHARD H. VOSS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL LAW:

CHATTEL MORTGAGES:

Prosecution may be instituted under Section 4492 R.S. Mo. 1939 in county from which mortgaged personal property is fraudulently removed.

April 5, 1950

4
6/50

Honorable Joe C. Welborn,
Prosecuting Attorney,
Stoddard County,
Bloomfield, Missouri.



Dear Mr. Welborn:

We have your recent request for an opinion from this office. Your letter is as follows:

"I would like an official opinion from your Department on the following proposition. A mortgagor owned mortgaged property which was located in Stoddard County. He loaded the property on a truck, which he himself had hired for the occasion, and took the property to an auction barn in Butler County, Missouri and sold the mortgaged property. I am wondering whether or not prosecution for disposing of the mortgaged property would lie in Stoddard County."

Section 4492 R.S. Mo. 1939, which covers the situation you describe is as follows:

"Every mortgagor or grantor in any chattel mortgage or trust deed of personal property who shall sell, convey or dispose of the property mentioned in said mortgage or trust deed, or any part thereof, without the written consent of the mortgagee or beneficiary, and without informing the person to whom the same is sold or conveyed that the property is mortgaged or conveyed by such deed of trust, or who shall injure or destroy such property, or any part thereof, or aid or abet the same, for the purpose of defrauding the mortgagee, trustee or beneficiary or his heirs or assigns, or shall remove or conceal, or aid or abet in removing or concealing such property, or any part thereof, with intent to hinder, delay or defraud such mortgagee, trustee or beneficiary, his heirs or assigns, shall,

Hon. Joe C. Welborn:

April 5, 1950.

if the property be of the value of fifty dollars or more, be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding six months, or by a fine of not less than one hundred dollars, or by both such fine and imprisonment. And if such property be of less a value than fifty dollars he shall be deemed guilty of a misdemeanor and upon conviction, shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment."

Your question is whether or not a prosecution would lie, in Stoddard County, for removing mortgaged property from Stoddard County with intent to hinder, delay, or defraud the mortgagee, as set out in said Section 4492.

In State v. Miller 255 Mo. 223, the Supreme Court held that this section creates three separate and distinct offenses. The significant part of the opinion in that case is as follows:

"* * * Section 4570 (now 4492) under which the charge in the case is brought, contains three separate and distinct offenses - which are either felonies or misdemeanors according as the amount or value of the property dealt with shall be found to be greater or less than fifty dollars. These three offenses consist: (a) of selling, conveying or disposing of mortgaged chattels; (b) of injuring or destroying or aiding and abetting in injuring or destroying such chattels, and (c) of removing or concealing, or aiding in the removing or concealing of the same, with certain conditions precedent and intent, more at length in the statute set out, but not necessary to be adverted to for our present purpose."

(Words in parenthesis ours)

State v. Griffin 228 S.W. 800 is a case very pertinent here. The following is quoted from pp. 803 and 804 of that case:

"**** The defendant, after the execution of said chattel mortgage, had no more right to remove or

Hon. Joe C. Welborn:

April 5, 1950.

conceal said property than he would have had, if the chattel mortgage had been executed originally instead of the contract. In other words, it was just as much a violation of section 4570, R.S. 1909, to remove and conceal the property covered by the chattel mortgage on defendant's equity of redemption as it would have been had the chattel mortgage covered the legal title as well. The purpose of the statute was to prevent parties from removing and concealing the property which they had conveyed, in either form, for the purpose of hindering, delaying, or defrauding the mortgage.

* * * * *

"In our opinion, section 4570, R.S. 1909, was enacted to meet just such an emergency. Possession of this car had been delivered to defendant in May, 1916. It had been removed from his possession prior to May, 1917. By his acts and conduct he attempted to deceive the mortgagee's agents as to the presence of the car, refused to pay the balance of the mortgage debt, refused to tell where the car was located, and refused to turn over same to the Weber Company or its agents. From the foregoing facts the jury would have the right to infer that defendant had removed said car from his own possession, concealed its location, and had placed it beyond the reach of the Weber Motor Car Company, for the purpose of hindering, delaying, or defrauding said company. If the jury found the foregoing facts from the evidence, they had the right to convict defendant of a felony, if the property in value was equal to or exceeded \$50; and if less than \$50 in value, to find him guilty of a misdemeanor, as designated in said section 4570.

"If defendant's contention should obtain, as to the meaning of said section, then all a mortgagor would have to do, in order to nullify the mortgage, would be to have the property removed from his own possession, conceal the locality where it was taken, deceive the mortgagee as to what became of it, refuse to deliver possession as required by the mortgage, and thus evade both the criminal laws of our state and his obligation to pay the balance of the debt."

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The latest applicable case construing Section 4492, supra, is State v. Nienaber 148 S.W. (2d) 537. The following quotations are from that case:

"By an information filed in the Boone County Circuit Court appellant was charged with a violation of section 4100 R.S. Mo. (now 4492) 1929, Mo. St. Ann. S. 4100, page 2900 in that he removed from the county of Boone in the state of Missouri mortgaged property, to-wit, fifteen head of two-year old steers valued at \$729, with the intent to hinder, delay and defraud the mortgages.

* * * * *

"In that case (State v. Miller, supra) the defendant was charged in one count of the information with removing and concealing mortgaged property and also with selling and conveying the property. This court held the information defective because it charged two distinct and separate offenses. We have no fault to find with that ruling. It does not follow, however, that an information must charge in the conjunctive all the acts mentioned in any one of the three groups. In other words, to charge in an information that the defendant injured mortgaged property would be sufficient, or that he disposed of the property. So if a defendant were charged with concealing mortgaged property the information would be sufficient. An information may charge, without being duplicitous, that a defendant removed and concealed mortgaged property, but that is not mandatory. We are of the opinion that an offense is complete when mortgaged property is removed from the county and state without the consent of the mortgagee and with intent to defraud such mortgagee. A reading of the statute and the case above referred to leaves no room for any other conclusion. * * * "

(Words in parenthesis ours)

In passing, it might be helpful to point out, that although the last part of the above quotation states that the offense is complete when the property is removed from the county "and state," it does not mean that to complete the offense, the mortgaged property must actually be taken out of the state. In the Nienaber

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case, supra, the facts disclose that property was actually taken out of the state, and it is believed that this latter fact is responsible for the inclusion of the words "and state;" for the statute itself does not require removal from the state, nor do any of the other cases construing this section suggest that removal from the state is a pre-requisite to prosecution.

It is, therefore, very clear, from the wording of the statute itself, and the cases construing it, that the mere removal from the county, of mortgaged property, with intent to hinder, delay or defraud the mortgagee, is an offense under Section 4492.

CONCLUSION

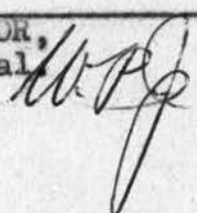
It is, therefore, the opinion of this office that a prosecution may be instituted, under the provisions of Section 4492, in the county from which mortgaged property is fraudulently removed.

Respectfully submitted,

H. JACKSON DANIEL,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
Attorney General



HJD:cg

**SPECIAL TOWNSHIP ROAD DISTRICTS:
REPORTS AND SETTLEMENT:**

The commissioners of special road districts in counties under township organization shall make and file annually with the township board of directors a detailed report and settlement of all monies received and expended by them.

October 30, 1950

11-9-50

Mr. Joe C. Welborn
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri



Dear Sir:

I.

We have received a request from you for an official opinion upon the question of whether or not special road districts in counties under township organization are required to file reports or publish financial statements. Your letter reads as follows:

"I am unable to find any provision of the statutes requiring Special Road District Boards in Counties under township organization to file an annual financial statement with the County Clerk. I am aware that section 24 of Article 6 of the Constitution contemplates such a statement. However, that section says that such a statement or settlement must be made, as required by law, and I suppose that a legislative enactment is necessary to actually require such a settlement.

"Section 8699, Laws 1945, page 1494, provides for such a settlement, if that section applies to counties with township organization. That section is a part of article 10, which does not seem to apply to counties with township organization. However, section 8691, which was reenacted in 1945 at the same time that section 8699 was reenacted, seems to refer to all special road districts, and I am wondering if these two sections, read together, might make section 8699 apply to counties with township organization.

"I will appreciate an official opinion from your department as to whether Special Road District Boards, in Counties under Township Organization

Mr. Joe C. Welborn

are required to file an annual itemized statement with the County Clerk. And I would further appreciate an official opinion as to whether or not such statement can be valid, if attested by only two members of the board, neither of whom is the secretary."

II.

Sections 8699 and 8691, Laws Missouri, 1945, pages 1494 and 1495, referred to in your letter, and part of the article and chapter of the Revised Statutes of Missouri, 1939, dealing with special road districts in counties not under township organization. Section 8673, Laws 1945, page 1494, is a reenactment of Section 8673 of Article X of Chapter 46, R.S. Mo. 1939. This section provides as follows:

"Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as herein after set forth into a special road district; Provided, however, the provisions of this section shall not apply to counties under township organization or to class one counties."

This section has been incorporated into the 1949 Revised Statutes, Missouri, as Section 233.01.

Sections 8691 and 8699, supra, have been incorporated in the 1949 Revised Statutes, under Chapter 233 dealing with special road districts in certain counties not under township organization. It is clear to us that it was not the intention of the Legislature to have said sections apply to special road districts in counties under township organization.

It is true that section 24 of Article VI of the Constitution of 1945 requires annual reports by all the legal subdivisions of the state. This section reads as follows:

"As prescribed by law all counties, cities, other legal subdivisions of the state, and public utilities owned and operated by such subdivisions shall have an annual budget, file annual reports of their financial transactions, and be audited."

Mr. Joe C. Welborn

But the section is not self-enforcing because of the clause "as prescribed by law."

You will find in 46 C.J., page 1041 the following statement:

"Where the constitution provides that an accurate and itemized statement of receipts and expenditures of public money shall be published annually in such form as the legislature shall provide, it is only after the legislature acts, and then only as it prescribes time, place, and manner, that there is any enforceable duty on officers or boards receiving and disbursing public funds to make reports or statements thereof. * * *"

Section 8840, R.S. Mo. 1939, which will be Section 233.34 R. S. Mo. 1949, provides among other things that:

"* * *Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; * * *"

(Underscoring ours.)

Section 8817, R.S. Mo. 1939, which will be Section 233.47, R. S. Mo. 1949, provides as follows:

"It shall be the duty of every road overseer to make a detailed report and settlement, under oath, to the township board at each regular meeting thereof, and on or before the twentieth day of March next after his appointment he shall make final report, under oath, of all moneys received and expended by him, and from what source received and on what account expended, and final report of the disposition of all tools, machinery, books, papers and other property received by him as such overseer and belonging to such township or road district, and shall settle in full with said board for all moneys which he may have belonging to such road district or which may be owing by him to such district, and shall

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deliver to said board all tools, machinery, books, papers and other property belonging to such township or road district and received by him as such overseer."

By virtue of Section 8817, R. S. Missouri, 1939, quoted above, we find that road overseers appointed in counties having township organization are called upon for a strict accounting of all funds coming into their hands and such accounting is made to the township board of directors, the authority appointing such road overseers. Since right and duty are correlative terms, the board of commissioners of a road district formed under Article 18 of Chapter 46, R. S. Missouri, 1939, when given the power, rights and authority of road overseers, are thereby obligated to perform the duties of road overseers which require a reporting and accounting of funds coming into their hands.

Volume 13, Words and Phrases, page 708, cites from cases, which hold that where power and authority or power and right is granted by the Legislature to any official or public corporation such a grant carries with it duty and obligation, as follows:

"It was said in *City of Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326, that it is a well-settled principle that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative; and the words "power and authority" in such case may be construed "duty and obligation." *Magaha v. City of Hagerstown*, 61 A. 832, 835, 95 Md. 62, 93 Am. St. Rep. 317.

"A provision in the charter of a town that the mayor and council should have 'power and authority' to pass ordinances for the comfort, good order, health, and safety of the inhabitants, is held not merely to confer power to pass such ordinances, but to make it imperative to do so; the words 'power and authority' being construed as equivalent to 'duty and obligation.' *Cochrane v. City of Frostburg*, 31 A. 703, 705, 81 Md. 54, 27 L.R.A. 728, 48 Am. St. Rep. 479."

Volume 50, Am. Jur. Sec. 381, page 393, states:

"In the interpretation of a statute, it is not to be presumed that the legislature intended to endanger or sacrifice great public interest.

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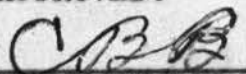
Indeed, a purpose to disregard sound public policy must not be attributed to the law-making power, except upon the most cogent evidence, and it is the duty of the courts to render such an interpretation of the laws as will best promote the protection of the public, in so far as this may be accomplished in accordance with well established rules of construction. Where a statute is ambiguous, courts interpreting the same may give consideration to the necessities of public welfare, policy, or interests, and where one construction of the statute will lead to public mischief which another construction will avoid, the latter is favored. * * *

We have cited the constitutional provision requiring all legal subdivisions of the state to file annual reports of their financial transactions. This constitutional provision constitutes public policy in regard to the making of reports by legal subdivisions of the state.

CONCLUSION

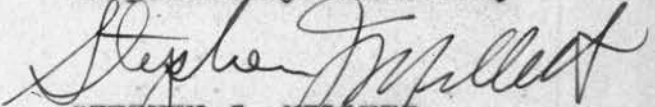
It is the conclusion of this department that the commissioners of special road districts in counties under township organization are not required to file an annual itemized statement with the county clerk of the county in which they are located, but they are required to make an annual detailed report and settlement, under oath, to the township board of directors of the township in which said district is located of all monies received and expended by them. This report and settlement will be published by the township board as part of their annual report, as provided by law.

APPROVED:


J. E. TAYLOR
Attorney General

SJM:mv

Respectfully submitted,


STEPHEN J. MILLETT
Assistant Attorney General

December 29, 1950

FILED 95

Honorable Leslie A. Welch
Judge of the Probate Court
Jackson County
Kansas City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"This is to request the opinion of your office anent certain legal questions connected with proposed legislation to provide increases in salaries and clerical allowance for all the probate judges, except those in St. Louis, St. Louis County, and Jackson County. At the annual meeting of the Probate Judges' Association last week a special legislative committee was appointed with Judge Waters of Clay County and Judge Despain of Shannon County as co-chairmen.

"At a preliminary meeting of said committee it was determined that it should first obtain an opinion from your office before bills are drafted. I have a letter today from Judge Waters. The question he propounds is as follows:

"Does the constitutional provision relating to increases of salaries of state, county and municipal officers (Art. VII, Sec. 13), extend to members of the judiciary?"

Honorable Leslie A. Welch

This department on October 4, 1946, issued an opinion addressed to Mr. E. G. Armstrong, Comptroller, in which the matter of the application of Section 13 of Article VII of the Constitution of Missouri, 1945, pertaining to the increase of compensation of state, county and municipal officers during their term of office and Section 24 of Article V pertaining to the compensation of judges were considered. The question there involved was whether or not an act of the Legislature providing an increase in salary for circuit judges might become effective during the terms of office of such judges. This department concluded that legislative action relative to the salary of members of the judiciary was limited only by Section 24 of Article V, which prohibits diminishing a judge's salary during his term of office, and that Section 13 of Article VII prohibiting increase of the compensation of state, county and municipal officers during their terms does not apply to members of the judiciary. We are enclosing herewith a copy of said opinion. We believe that it answers the question asked by you.

CONCLUSION

Therefore, this department is of the opinion that the constitutional provision prohibiting increases during terms of office of salaries of state, county and municipal officers (Article VII, Section 13) does not apply to probate judges.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR
Attorney General

RRW/feh

SCHOOL: County superintendent who employed other counsel
OFFICERS: to represent him in a civil action not entitled
FEES: to reimbursement for attorney fees.

May 18, 1950

5/27/50



Mr. Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads:

"On September 28, 1949 this Department reported to your office a case which involved Audrain County, in which the County Superintendent of Schools denied the assignment of elementary pupils living in a common school district adjacent to the School District of Mexico. The parents of the school children who were denied assignment, employed the County Prosecuting Attorney as counsel to bring a mandamus suit in circuit court to compel the County Superintendent of Schools to make an official assignment as provided in Senate Bill 308, Section 10461, Laws of 1945. The County Superintendent of Schools employed an attorney to defend his action in refusing to make assignment. The employment of such counsel involved an expenditure of money. The circuit court, in this case, denied the petition for mandamus action.

"The question asked in this case was whether or not the County Superintendent of Schools was entitled to the legal counsel of the Prosecuting Attorney in the defense of his official actions in administering the school laws under his jurisdiction. Also, inquiry was made about the responsibility for paying both counsel and court costs.

Mr. Hubert Wheeler

"In your opinion of November 29, 1949, it was ruled as follows:

"It is the opinion of this department that the county and the state are both "interested" and "concerned," as those terms are used in Sections 12942 and 12944, R. S. Mo. 1939, when the county superintendent of schools is made a defendant in a civil action touching his official acts in administering the school laws within his jurisdiction, and it is the duty of the county prosecuting attorney to defend and represent the county superintendent of schools in such action."

"The second question asked in the request of September 28, 1949 was not answered specifically in your opinion, but rather suggestion was made that the inquiry was not a subject for disposition in this opinion. However, there still remains a problem in connection with the Audrain County case. The County Superintendent of Schools in this case, having been forced to employ counsel, desires to know if he is entitled to reimbursement for such costs, and if so, from what county fund should such payment be made.

"Since this question seems to be of general interest, and may be one applicable to any county in the State, I shall be glad to have your advice and official opinion in regard to the following questions:

"1. Is the County Superintendent of Schools entitled to reimbursement from the county when he has been denied counsel of County Prosecuting Attorney to defend his actions as county superintendent of schools in relation to the enforcement of laws governing the public schools of the county?

"2. If the County Superintendent is entitled to such reimbursement from what county moneys should payment be made?"

As you have pointed out, in our opinion to you under date of November 29, 1949, we held that under Section 12944, R.S. Mo. 1939, it is the duty of the prosecuting attorney to represent the county

Mr. Hubert Wheeler

superintendent of schools in a civil action in which he is made a defendant and which touches his official acts in administering the school laws.

Under the facts you have presented the prosecuting attorney was interested in the particular civil case in which the county superintendent was the defendant in that he was representing the plaintiff. Such being the state of affairs, the county superintendent employed other counsel, and with such legal assistance proceeded to trial and won the case.

At the outset, we state that an examination of the laws relating to the powers and duties of the county superintendent of schools fails to disclose any specific statutory authority permitting a county superintendent of schools to employ an attorney to represent him in litigation and be reimbursed for any attorney fees paid.

In the usual case, where the services of the prosecuting attorney would be available, the county superintendent would certainly not be permitted to hire other counsel in preference to the legal services obtainable from the prosecuting attorney and then be reimbursed from public funds for expenditure made in the payment of attorney fees.

We are further aware that in the situation at hand the county superintendent is seeking to be reimbursed for an outlay or expenditure, and it is therefore to be distinguished from cases announcing the rule that officials may not receive compensation or income in addition to that authorized by law. *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 344 Mo. 795; *Smith v. Pettis County*, 136 S.W. (2d) 282, 345 Mo. 839.

At first blush it would appear that the county superintendent might be entitled to reimbursement from public funds on the theory that he had made an outlay or expenditure of money necessary for the performance of the duties of his office. *Rinehart v. Howell County*, 153 S.W. (2d) 381, 348 Mo. 421; *Ewing v. Vernon County*, 116 S.W. 518, 216 Mo. 681. However, in these cases the court's decision was based upon the construction of particular statutes involved and held that by reasonable implication they permitted payment of some particular item of expense, such as janitor service, stamps, stationery and stenographic hire. This was so pointed out in *Maxwell v. Andrew County*, 146 S.W. (2d) 621, 347 Mo. 156, and *Alexander v. Stoddard County*, 210 S.W. (2d) 107.

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There can be no question that the county court in some instances may employ legal counsel to represent the county in cases in which the county is concerned or interested. This office, in an opinion submitted to Honorable Charles B. Butler, Prosecuting Attorney of Ripley County, under date of March 27, 1946, made an exhaustive study and discussion of the power of the county to employ legal counsel.

One of the instances when the county may employ legal counsel in cases in which the county is interested or concerned is when the prosecuting attorney refuses, or is unavailable, to represent the county. In the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S.W. 129, there was an action on the official bond of the Collector of Buchanan County to recover a certain sum constituting taxes and funds belonging to said county which had been collected and retained by the defendant collector. The money was being retained by the collector on the ground that it constituted his commission on collection of delinquent taxes. The prosecuting attorney had refused to bring the suit because he believed that the collector was entitled to the money that he was holding, and the county hired another attorney. The right of the county to employ other counsel was questioned, and in ruling on the point the court said at S.W. 1.c. 134:

"Another contention is that the court erred in overruling appellant's motion to dismiss this action because it was not brought by the prosecuting attorney of Buchanan county, but by private counsel employed by the county court of that county. The prosecuting attorney was repeatedly directed by the county court to bring the suit, but, being of the opinion that the collector was entitled to retain the 4 per cent. commissions imposed on delinquent taxpayers by the statute in addition to the \$9,000 compensation provided by subdivision 15, supra, he persistently refused to bring the suit. * * *

"It is the duty of prosecuting attorneys to commence and prosecute all civil and criminal actions in their respective counties, in which the county or state may be concerned. * * * We are of the opinion that when the prosecuting attorney refused to perform his duty, as in this instance, the county court was not shorn of its power to act in the

Mr. Hubert Wheeler

discharge of its duties in the premises, nor required to supinely abdicate its functions. The servant is not greater than his master. The county court was empowered by the statute to order the suit to be brought and to require the prosecuting attorney for the county to commence and prosecute the action. The refusal of the prosecuting attorney to obey the order of the county court created an emergency. * * * In this emergency we have no doubt the county court had the implied power to employ other counsel to bring the suit; otherwise it would have failed in the discharge of a duty imposed upon it by the statute. * * *

In the instant case the prosecuting attorney had taken a position hostile to that of the county and the superintendent of schools by accepting employment from parties on the other side of the lawsuit, and we believe that the county, under the circumstances, could have contracted for legal counsel to represent the county superintendent of schools.

However, as we understand the situation at hand, the county court did not employ an attorney to represent the superintendent of schools; rather he contracted for his own counsel to represent him without requesting the county court to secure him an attorney.

As previously pointed out, there is no statute authorizing the county superintendent of schools to employ counsel and be reimbursed from public funds. Nor do the facts show that the superintendent of schools obtained any authorization from the county court to employ counsel or to make any contract for legal services on behalf of the county.

In the case of Missouri-Kansas Chemical Co. v. Christian County, 352 Mo. 1087, 180 S.W. (2d) 735, the plaintiff company sued Christian County to recover the purchased price of soap and disinfectant contracted for by the courthouse janitor and one member of the county court for use in the courthouse. In denying recovery the court said at l.c. 736, 737:

" * * * Section 13766 authorizes the county court by an order made of record to appoint an agent to make any authorized contract on behalf of the county. The county clerk testified there was no record authorizing the janitor or any one else to buy these supplies.

Mr. Hubert Wheeler

Under the circumstances the janitor was not the agent of the county and his purchases did not bind the county. The same is true of the presiding judge. He likewise was not the agent of the county, nor did he have authority in his individual capacity as presiding judge to make a contract on behalf of the county.

* * *

"There is no record of the county court authorizing the purchase of the materials. A county court is a court of record and speaks only through its records; * * *

* * * * *

"The terms of the statute referring to a contract made with 'the county authorities, or with any agent of the county lawfully authorized' do not permit recovery on the orders signed by the presiding judge or the court house janitor because neither was authorized to make a contract. We have held that this section does not give the claimant a right to recover where he has performed under a contract with a county official if such official is not authorized by law to make the contract. Bryson v. Johnson County, 100 Mo. 76, 13 S.W. 239."

In view of the above decision it would seem that the superintendent of schools contracting for legal counsel without authorization from the county court performed an ultra vires act. Surely the attorney employed could not recover directly from the county for legal services rendered the superintendent of schools, and we do not believe that the rule expounded in the Christian County case could be circumvented by permitting the official contracting for the legal services to recover from the county the amount of the fee and then pay the attorney.

Under the circumstances we believe that the county superintendent was acting as he thought best in employing other counsel. But, under the facts presented, we do not believe that the county superintendent of schools, as a matter of right, is entitled to reimbursement from the county out of public funds.

Since we believe the county court would have had the power to employ legal counsel to represent the superintendent of schools in the case in which he was a party defendant, there is some

Mr. Hubert Wheeler

authority to the effect that having such power it could have afterwards ratified the contract which it could have originally negotiated. State ex rel. Crow v. St. Louis, 174 Mo. 125, 73 S.W. 623; Walker v. Linn County, 72 Mo. 650; City of Moorehead v. Murphy, 94 Minn. 123, 102 N.W. 219. However, under the facts presented, it does not appear that the county court ever ratified any contract of employment made by the county superintendent of schools.

In the premises, we are constrained to the view that the county superintendent of schools is not entitled to the reimbursement desired, and your first question must, therefore, be answered in the negative.

Our conclusion reached in the first question forecloses answering the second question.

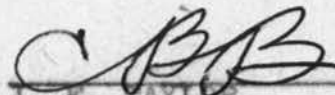
CONCLUSION

It is, therefore, the opinion of this department that when the county superintendent of schools is denied the legal services of the prosecuting attorney in a civil action relating to the administration of the school laws, and in which the county superintendent is a party defendant, reimbursement from public funds for the payment of attorney fees cannot be made to the county superintendent who employed other counsel without authorization from the county court.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

RFT:ml

GUARDIAN:
WARD:

Guardian not authorized to register Series E United States Savings Bonds purchased with minor ward's funds as being jointly owned by minor ward and guardian. Such bonds should be registered in name of minor ward alone, with appropriate reference to legal guardianship.

May 18, 1950.

Hon. S. F. Wier,
Judge of Probate
Atchison County,
Rock Port, Missouri.



5/22/50

Dear Sir:

This is in reply to your recent request for an opinion from this office, which request reads as follows:

"We have a guardianship estate in this Court as follows:

"William Jones died leaving a widow, Helen Jones and one child, Mary Ann Jones, a minor. The widow, Helen Jones has qualified as the guardian and curatrix of the minor child. The ward's estate consists of cash only. The Guardian and Curatrix has invested the entire funds belonging to the minor in United States Series E Bonds, having them registered in the following names:

'Mary Ann Jones
or
'Mrs. Helen Jones.'

"Is this Court within its rights to approve such an investment?"

The privilege of the guardian to invest the funds of the ward in United States Savings Bonds of the E Series is unquestioned. That right is conferred by Sec. 418 (Mo. R.S. 1939) which reads in part as follows:

"Guardians and curators shall, unless the money be invested in improving the real estate of wards as hereinafter provided, loan the money of their wards at the highest legal rate of interest that can be obtained, on prime real estate security, or invest it in bonds of the United States, or bonds guaranteed by the United States.* * *"

The question then resolved itself to the proper manner of registering Series E Savings Bonds purchased by a guardian with funds of the ward.

Hon. S. F. Wier.

Your attention is directed to United States Treasury Department Regulations governing United States Savings Bonds, Department Circular No. 530, Sixth Revision, dated February 13, 1945, Section 315.4 par. (b) (2) reads as follows:

"A minor, whether or not under legal guardianship, may be named as owner, co-owner, or beneficiary on bonds purchased by another person with such person's own funds. A minor may name a co-owner or beneficiary on bonds purchased by him from his wages, earnings, or other money in his possession. But bonds purchased by another person with funds already belonging to a minor should be registered in the name of the minor alone, followed by an appropriate reference if the minor is under legal guardianship, as, for example, 'John Smith, a minor under legal guardianship', or 'John Smith, a minor under legal guardianship of Henry C. Smith.'"

To register the Savings Bonds as you indicate in your letter as jointly owned by both the ward and the guardian when purchased by funds belonging to the ward would seem improper. An investment of the ward's funds in the guardian's own name as an individual is generally improper, and renders the guardian liable for any loss that may result irrespective of any question of good faith or honest intention on his part. A guardian is required to handle the funds of the ward as a separate trust fund preserving its identity as such, and not mingling or using it with any other fund. For the guardian to hold title jointly with the ward is such a failure to identify the bonds as the property of the ward as to be improper.

It is the opinion of this office that ownership of Series E United States Savings Bonds purchased with funds belonging to a ward should be registered as prescribed by the United States Treasury Regulations and not as being jointly owned by the guardian and ward.

Since these bonds have already been issued may we direct your attention to section 315.32 of the Treasury Regulations (cited supra) which provides in part that reissue of a savings bond will be made to show a change in the name of owner, co-owner or designated beneficiary.

For your further guidance section 315.38 of the Treasury Regulations stipulates the manner of redemption and payment to legal guardians in the following words:

Hon. S. F. Wier.

"If the form of registration of a savings bond indicates that the owner is a minor or has been judicially declared to be incompetent to manage his estate and that a guardian or similar representative has been appointed for the estate of such minor or incompetent by a court having jurisdiction or is otherwise legally qualified, payment will be made only to such guardian or similar legal representative. In such case the request for payment appearing on the back of the bond should be signed by the guardian or other legal representative as such, for example, 'John A. Jones, a guardian (committee) of the estate of Henry W. Smith, a minor (an incompetent).'" Unless the form of registration gives the name of the representative, there must be submitted in support of the request a certificate of a certified copy of the letters of appointment from the court making the appointment under the seal of the court. Except in the case of corporate fiduciaries, such certificate or certification should state that the appointment is in full force and should be dated not more than six months prior to the date of presentation of the bond for payment. See Subpart O for payment provisions applicable to bonds registered in the names of guardians and similar fiduciaries. Where the form of registration does not indicate that the owner is a minor for whose estate a guardian has been appointed, a notice that such guardian has been appointed will not be accepted by the Treasury Department for the purpose of preventing payment to the minor or to a parent or other person on behalf of the minor as provided in the two following sections. However, if a legal guardian presents for payment a bond so registered accompanied by proof of his appointment, payment shall be made to such guardian."

CONCLUSION.

Series E. United States Savings Bonds purchased by a guardian or curator with funds belonging to a minor ward should be registered in the name of the minor alone, followed by an appropriate reference to the legal guardianship. Such bonds should not be registered as jointly owned by the guardian and ward.

Respectfully submitted,

JOHN E. MILLS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General

SCHOOLS: Procedure for second plan of reorganization would be the same as used for the first plan; subsequent proposed plans of reorganization may include previously organized enlarged school districts.

July 20, 1956

*Opinion No 10, 1956
Nov 15, 1956 to
Paul Boone should
be sent with this
opinion when a
copy of this
opinion is
sent out.*

Mr. Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which, in part, reads:

"1. Is the county board of education directed to follow the same procedure used in the first plan when planning, proposing, and submitting to the voters a second plan of reorganization as provided in Section 12, S. B. 307?

"2. In proposing the second plan of reorganization as directed under Section 12 of S. B. No. 307, and proposing subsequent reorganization plans as conditions warrant as directed by Section 6, Item 3, of S. B. No. 307, does the county board of education have the authority to include one or more reorganized districts along with other non-reorganized districts when proposing a second plan for school district reorganization, or should such proposed plan include only the remaining districts that are not reorganized?"

You have presented two questions in your request, and we shall undertake to answer them in the order submitted.

As you know, Senate Bill No. 307, as contained in Laws of Missouri, 1947, Vol. II, page 370, et seq., is a recent enactment of the Legislature, and there have been no appellate court decisions construing sections of the act about which you inquire.

Mr. Hubert Wheeler

Generally, the first five sections of Senate Bill No. 307 relate to the creation and organization of a county board of education in each county of the state.

Section 6, which sets out the duties of the county board of education, provides for the first steps to be taken toward reorganizing the school districts within the counties, and, in part, reads:

"The county board of education, as provided for in the preceding sections, shall

(1) Within six months after its organization, make or cause to be made and completed a comprehensive study of each school district of the county and prepare a plan of reorganization. Such study shall include:

(a) The assessed tax valuation of each existing district and the differences in such valuation under the proposed reorganization plan;

(b) The size, geographical features and the boundaries of the proposed enlarged districts;

(c) The number of pupils attending school, average daily attendance, and the population of the proposed enlarged districts;

(d) The location and conditions of school buildings and their accessibility to the pupils;

(e) The location and condition of roads, highways and natural barriers within the county;

(f) The high school facilities of the county and recommendations for improvement of same;

(g) The conditions affecting the welfare of the teachers and pupils;

(h) Any other factors concerning adequate facilities for the pupils.

Mr. Hubert Wheeler

(2) Upon completion of the comprehensive study, but not later than May 1, 1949, submit to the State Board of Education, a specific plan for the reorganization of the school districts of the county. Such plans shall be in writing and shall include such charts, maps and statistical information as are necessary to properly document the plan for the proposed reorganized districts."

Section 7 generally provides for the examination of plans of reorganization by the State Board of Education and the approval or disapproval of the plans by said board. Following the approval of a plan of reorganization by the State Board of Education, the act requires an election whereby said plan of reorganization is to be submitted to the voters for rejection or adoption of the proposed plan. Thus Section 8 of the act, in part, provides:

"Within sixty days after receipt of approval by the State Board of Education of the reorganization plan, the secretary of the county board of education shall call an election in each proposed enlarged school district that lies wholly within the county or has been designated by the State Board of Education as belonging to the county. * * * All qualified voters resident in the proposed enlarged school district shall have the right to cast their ballots for or against the proposal. * * * The judges and clerks of the election shall certify to the secretary of the county board of education the total votes for and the total votes against the proposed enlarged district. A majority affirmative vote of the total votes cast shall be required for adoption of the proposed enlarged district."

If the proposal to form an enlarged school district receives a majority of the votes cast on such proposal, provision is then made for the election of six directors in such enlarged district and the turning over to them the property, records, books and papers of the component school districts which comprise the territory incorporated within the enlarged district (Sections 10 and 11 of the act).

By citing, discussing and quoting the provisions of the afore-mentioned sections of Senate Bill No. 307, we have sought to present the statutory procedure for the formation, approval and submission of the first plan of reorganization from the time

Mr. Hubert Wheeler

a comprehensive study of the school districts within the county is begun by the county board of education to the assumption of control of the new enlarged district by its duly elected board of directors.

In the event any proposed enlarged district is not accepted by the voters, this does not terminate future action toward reorganization of the school districts within the counties, for Section 12 of the act, in part, provides:

"In the event that any proposed enlarged district has not received the required majority affirmative vote, the school districts constituting the proposed new school district shall remain as they were prior to the election, but in all such cases the county board of education shall prepare another plan in the same manner as provided for the first plan and the second plan shall be submitted to a vote in like manner as the first, but not sooner than one year nor later than two years after the date of disapproval of the first plan. * * *" (Emphasis ours.)

As we read the above section, and particularly the under-scored portion thereof, we construe it to clearly provide that in the planning, proposing and submitting to the voters a second plan of reorganization the same procedure applicable to the first plan, as hereinbefore set out, shall be followed. Consequently, your first question is answered in the affirmative.

Now let us consider the second question presented.

At the outset, it is our thought that the act does not contemplate the formation, submission and acceptance of only one plan of reorganization within the counties which shall be final and conclusive insofar as future reorganization is concerned, but rather it contemplates circumstances arising which will warrant new or subsequent reorganization plans being proposed, to be adopted if acceptable to the voters. It is so manifested in Section 6, subparagraph 3, of the act, which provides:

"Continue to study the school system of the county and proposed subsequent reorganization plans as conditions warrant."

We further perceive that the only limitation on the submission of subsequent plans of reorganization is one of time, for Section 12 of the act, in part, provides:

Mr. Hubert Wheeler

" * * * Any subsequent plan shall not be submitted sooner than one year following the date on which the last vote on reorganization was taken."

We further observe that Section 6 of the act, in providing for a study to be made by the county boards of education in the preparation of a plan of reorganization, be it the first or a subsequent plan, refers to "each school district of the county." We construe this to mean any and all school districts within the county, be they three-director common school districts or six-director city, town, consolidated or enlarged school districts.

In subparagraph 3, Section 6, of the act the Legislature, in providing for continuing study of "the school system of the county" and proposing subsequent reorganization plans, certainly intended that previously organized enlarged districts would be a part of the "school system of the county."

In Section 11 of the act the Legislature has prescribed the procedure to be followed by "any former six-director district" that is merged in any enlarged district. Inasmuch as reference is made in the statute to "any former six-director district," we believe that the term would include any previously formed enlarged district which is composed of six directors that might be merged in a subsequently organized enlarged district. Generally, an enlarged district having six directors would be considered a six-director district.

In other words, as we read the act we do not believe that the Legislature intended that an enlarged school district once formed and organized within a county would be no longer a subject of comprehensive study by the county board of education, and would not be subjected to continuing study as a part of the "school system of the county" with a view of proposing subsequent plans of reorganization.

It would therefore follow that in proposing a subsequent plan of reorganization the county board of education, if conditions warranted it, could include as territory in the subsequent proposed plan a previously organized enlarged district. An example where this might be desirable would be in the proposal of a subsequent and more extensive plan of reorganization with territory of the proposed enlarged district lying in more than one county.

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In interpreting the act as permitting a subsequent plan of reorganization to include a previously organized enlarged district, we have sought to ascertain and conform to the intent of the Legislature. Such is a rule of statutory construction so well known to the courts and so often applied that the citation of the authority is unnecessary.

CONCLUSION


It is therefore the opinion of this department that in the planning, proposing and submitting to the voters a second plan of reorganization the same procedure applicable to the first plan should be followed.

It is our further opinion that in proposing a subsequent plan of reorganization, as conditions warrant, the county board of education may include as territory within the subsequent proposed plan previously formed enlarged districts together with other types of school districts.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

RFT:ml

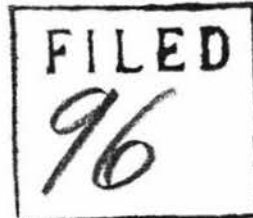
COUNTY SUPERINTENDENT
OF PUBLIC SCHOOLS:
SALARY:

If the 1950 census shows a change in population of the county, then the salary of the county superintendent of public schools of such county will be changed in accordance with said census as of July 2, 1951.

August 31, 1950

9-7-50

Mr. Hubert Wheeler
Commissioner of Education
Jefferson City, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion of this department, which letter reads in part as follows:

"Many inquiries are being made by County Superintendents of Schools about the effective date of the 1950 decennial census and as it applies to any changes in the salary of the County Superintendents of Schools.

"Section 10609, R. S. 1939, provides that the County Superintendents of Schools shall hold their office for a term of four years beginning on the first Monday in July. According to this law the next election of County Superintendents of Schools shall be the first Tuesday in April, 1951 for the term beginning the first Monday in July of next year. Other county officers who are elected at the general election in November take their office in January instead of July as in the case of the County Superintendent.

* * * * *

"1. Will all county officers have their salaries adjusted beginning January 1, 1951 in counties where the population bracket is changed by the 1950 decennial census or will there be an exception to this rule for County Superintendents of Schools whose fiscal year for salary purposes begin in July? If there is an exception, will County Superintendents' salaries change by July 1, 1951 instead of January 1, 1951?"

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Section 10609, R. S. Mo. 1939, as reenacted, Laws of Missouri, 1943, page 890, provides as follows:

"The qualified voters of each and every county in this state shall elect a county superintendent of public schools at the annual district school meeting held on the first Tuesday in April, 1943, and every four years thereafter. Said county school superintendent shall be a citizen of the county and at least twenty-four years old. He shall have taught or supervised schools as his chief work during at least two of the eight years next preceding his election, or shall have spent the two years next preceding his election as a regular student in a recognized college or university. At the time of his election he shall hold a certificate authorizing him to teach in the public schools of Missouri, and shall have completed at least one hundred twenty semester hours of college work, including at least fifteen hours in the field of education, not less than five of which shall have been in school supervision and administration; or he shall be serving as county superintendent of public schools. Each and every county school superintendent elected on the first Tuesday in April, 1943, and thereafter, shall hold said office for a term of four years from and after the first Monday in July following his election, or until a successor has been chosen and has qualified; and a vacancy caused by death, resignation, refusal to serve, or removal from the county, shall be filled by the governor by appointment for the unexpired term, subject to the same qualification requirements as if the appointee had been elected. The county school superintendent shall turn over all books, papers, certificates, stub-books, and records in his possession to his successor. All acts and parts of acts conflicting with this section are hereby repealed."

This section shows that the office of county superintendent of public schools is an office in this state created by the Legislature.

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The following statutes show that the county superintendent of public schools shall receive an annual salary.

Section 10619, Mo. R.S.A., reenacted, Laws of Missouri, 1945, page 1722, Section 1, provides in part:

"In all counties of class one now or hereafter containing a population of 400,000 to 600,000 inhabitants as shown by the latest decennial Federal census, the county superintendent of schools shall receive an annual salary of \$4,205.00; and in all counties of class one now or hereafter containing a population of less than 400,000 the county superintendent of schools shall receive an annual salary of \$6,000.00. * * * "

Section 10618.7, Mo. R.S.A., Laws of Missouri, 1945, page 1712, Section 1, provides:

"In counties of the second class, the county superintendent of public schools shall receive an annual salary of \$2250.00, to be paid monthly from the county revenue fund in the form of a warrant drawn upon the county treasury. The state of Missouri shall appropriate annually, out of the general revenue fund of the state of Missouri, \$400.00 to each and every county of the second class."

Section 10618.1, Mo. R.S.A., Laws of Missouri, 1945, page 1709, Section 1, provides:

"In counties of the third class in this state, having less than 7,000 population, the county superintendent of schools shall receive \$1050.00 per annum; in those having a population of 7,000 and less than 10,000, he shall receive \$1200.00 per annum; in those having a population of 10,000 and less than 12,000, he shall receive \$1350.00 per annum; in those having

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a population of 12,000 and less than 15,000, he shall receive \$1600.00 per annum; in those having a population of 15,000 and less than 25,000, he shall receive \$1800.00 per annum; in those having a population of 25,000 and less than 36,000, he shall receive \$2000.00 per annum; and in those having a population of 36,000 or more, he shall receive \$2100.00 per annum. The State of Missouri shall appropriate annually, out of the general revenue fund of State of Missouri, \$400.00 to each and every county of the third class. The county superintendent of schools shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasury."

Section 10618.4, Mo. R.S.A., Laws of Missouri, 1945, page 1711, Section 1, provides:

"In counties of the fourth class in this state, having less than 7,000 population, the county superintendent of schools shall receive \$1050.00 per annum; in those having a population of 7,000 and less than 10,000, he shall receive \$1200.00 per annum; in those having a population of 10,000 and less than 12,000, he shall receive \$1350.00 per annum; in those having a population of 12,000 and less than 15,000, he shall receive \$1600.00 per annum; in those having a population of 15,000 or more, he shall receive \$1800.00 per annum. The State of Missouri shall appropriate annually, out of the general revenue fund of the State of Missouri, \$400.00 to each and every county of the fourth class. The county superintendent of schools shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasury."

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Section 1.10 (654, 13430) of Senate Revision Bill No. 1001, of the 65th General Assembly, reads as follows:

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1, of each tenth year after 1951."

This section became effective April 14, 1950.

The question arises as to whether or not the county superintendent of public schools is a county officer within the meaning of this section. The Supreme Court of Missouri in the case of *Hollowell v. Schuyler County*, 18 S.W. (2d) 498, 322 Mo. 1230, 1.c. 499, 500, held:

"It is further claimed by the appellant that the superintendent of schools is not a county officer within the purview of article 14 of the Constitution, and therefore the constitutionality of the emergency clause is immaterial. We are unable to understand how that could affect the situation, since the sections upon which appellant depends, 11352 and 11354, apply to superintendents of schools. The superintendent of schools is a county officer, though not specially mentioned in the Constitution. Article 9, Sec. 14, of the Constitution provides that the 'General Assembly shall provide for the election or appointment of such other county, township and municipal officers as public convenience may require.'

"By section 11343, R. S. 1919, the Legislature created the office of superintendent of schools in each and every county in the state and in succeeding sections prescribed the duties of

Mr. Hubert Wheeler

such office. Therefore, it is a county office created by the Legislature under the authority of the Constitution."

Section 10620, R. S. Mo. 1939, provides as follows:

"For the purpose of ascertaining the population of any county in this state in order to determine the salaries of County Superintendents of public schools, the last previous decennial census of the United States shall be conclusive."

Prior to the enactment of Senate Revision Bill No. 1001, cited above, there was no statutory provision, either federal or state, which designated the time when the result of a federal decennial census became official.

In the case of *Garrett v. Anderson*, 144 S.W. (2d) 971, a Texas case, which was rendered November 27, 1940, the court held the preliminary report of the census for Bexar County, Texas, by the supervisor of the census for the 20th District of Texas, was an official announcement on behalf of the federal government and that the county officials of that county were authorized to take official notice of that report as a declaration of the last preceding federal census.

The Federal District Census Supervisors in Missouri have made their preliminary reports and announcements of the population of the respective counties in their districts prior to July 7, 1950. If Senate Revision Bill No. 1001 had not been enacted by the 65th General Assembly, then the salaries of the various county superintendents of public schools in Missouri, in counties in which the population has decreased or increased, placing the county in a different population bracket, would have changed accordingly as of July 7, 1950.

It is true that the Missouri Constitution of 1945, Article VII, Section 13, prohibits an increase in the compensation of state, county and municipal officers during their term of office. However, the Supreme Court of Missouri, in the case of *State ex rel. Harvey v. Linville*, 300 S.W. 1066, has held, 1.c. 1067:

"The increase of salary which a statute permits after an election showing an increase of population is not in violation of the

Mr. Hubert Wheeler

Constitution, in that the salary is increased during the term for which the officer was elected, because the law in force at the time of his election fixes his salary, to be ascertained at periods as changed by the increase in population. State ex rel. v. Hamilton, 303 Mo. 302, 260 S.W. 466."

The Supreme Court of Missouri in the case of State ex rel. Jacobsmeier v. Thatcher, et al., 92 S.W. (2d) 640, 1.c. 643, said:

"Thus it is seen that the act assailed was passed by the Legislature some sixteen months before the relator was elected to office, and he, like every one else was charged with knowledge of the law on the date it became effective. His election to office constituted no contract between him and the county. Through his election and induction into office he acquired, and now has, no vested right to salary - or to the office itself if the Legislature had chosen to abolish it. The office of clerk of the circuit court is not one created or provided in the Constitution; it is one authorized by that document to be created by the General Assembly, and, once created, to be abolished or not at the will of that body. State ex rel. McKittrick v. Bair, 333 Mo. 1, 63 S.W. (2d) 64; State ex rel. Crowe v. Evans, 166 Mo. 347, 66 S.W. 355."

The Supreme Court in the case of Sims v. Clinton County, 8 S.W. (2d) 69, said, 1.c. 70:

" * * * The case presents precisely the same questions as were considered and determined by Division No. 2 of this court in State ex rel. Harvey v. Linville, 300 S.W. 1066. In that case the relator was elected and qualified as superintendent of public schools of Benton county on April 1, 1919. It was there held that the Act approved March 28, 1919 (Laws 1919, p. 694), shown as sections 11352 and 11354, R. S. 1919, did not go into immediate effect under the emergency clause attached to said act, under the provisions of section 36, art. 4, of the Constitution,

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for the reason that it was an act subject to the referendum, and not within the exceptions mentioned in the referendum section, section 57 of article 4. As a result of that holding it was further held that the salary of the relator in that case was to be determined by the law in force at the time of his election. The law in force at the time was section 10938, R. S. 1909; and, further applicable also, and in force, was section 10719, R. S. 1909, which is section 11016, R. S. 1919. These two sections, respectively prescribed, the one, the amount of salary of the superintendent dependent upon the population of his county, and the other, the method of ascertaining such population. Certain conclusions appropriate in the determining of the instant case, and stated in the opinion in *State v. Linville*, supra, loc. cit. 1067, are as follows:

* * * * *

"Section 10938, R. S. 1909, provides for ascertaining the "annual" salary. Section 11352, R. S. 1919, says that the superintendent shall receive so much money, dependent upon the population of the county, without saying whether it was per annum. From the context it must be presumed that annual salary was meant. "Annual salary," as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that "annual," as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

"Accepting then sections 10938 and 10719, R. S. 1909, as governing in determining the salary of the deceased, it clearly appears that she received more than was due her for the period of her incumbency. Under the provisions of those sections, and for the purpose of determining the salary for the first two years, the population of the county was to be fixed by the total vote cast at the

Mr. Hubert Wheeler

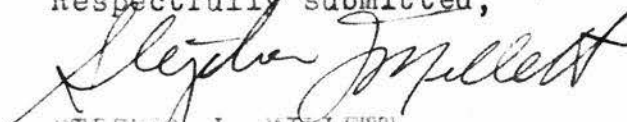
general election of 1918, which resulted in an ascertained population of more than 12,000 and less than 15,000, and in an annual salary of \$800, or for the first two years a total authorized salary of \$1,600. By the same sections and under the total vote of 6,519 at the presidential election of 1920, there was an ascertained population of more than 30,000 and less than 50,000, authorizing a salary of \$1,400 per annum. Under the ruling in State v. Linville, supra, adopted by us, this increase to \$1,400 went into effect on April 1, 1921. * * *

By virtue of the decisions of the Supreme Court of Missouri in the State v. Linville case, supra, and in the Sims v. Clinton County case, supra, we conclude that the change in salaries of county superintendents of public schools will go into effect at the beginning of the office year next after January 1, 1951, which will be July 2, 1951. This also is the beginning of a new term for this office, so no increase or decrease in salary will occur during their present term of office. The Supreme Court of Missouri has said in effect that the annual salary of such officials must be calculated each year as a whole, beginning with the date of commencement of their term, which began on the first Monday in July, 1947 -- that is, July 7, 1947.


CONCLUSION

It is the opinion of this department that the 1950 federal decennial census becomes effective January 1, 1951, in this state, and for the purpose of effecting a change in the salaries of County Superintendents of public schools, in all those counties where such salaries are based upon population, said salaries will be increased or decreased on July 2, 1951, according to the salary bracket created in such counties by said 1950 census.

Respectfully submitted,


STEPHEN J. MILLETT,
Assistant Attorney General.

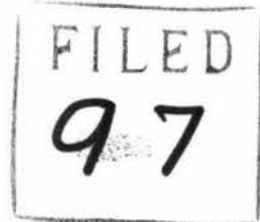
APPROVED:


J. E. TAYLOR,
Attorney General.
SJM:vlm

CRIMINAL LAW:

To sustain conviction of leaving scene of accident, defendant must have actual knowledge of the accident and injury to person or damage to property.

January 3, 1950



Honorable Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department which reads as follows:

"We have a party who is charged with leaving scene of accident without giving his name to the other party, and without reporting same to the nearest police office, etc.

"The defendant claims that he was unaware of the fact that his car had struck another car and shoved same off the highway at a very steep place, and it occurred while he was passing this car on this stretch of road, by side swiping it lightly.

"After the accident, the defendant had stopped at a road house about a mile away from the scene of the accident, and at that place a party there who came up while the defendant was there, told him that he had crowded this fellow off the highway back at the place but the defendant did not then make any effort to go back to the scene at all, but continued up the highway about 12 or 15 miles to another road house, where the officers got him.

"Would the fact that he failed to report the accident after he had been informed thereof, at the place one mile from the scene of the accident, make him guilty of this offense, if in fact he did not actually know that he had struck the car when he originally left the

Honorable Homer F. Williams

scene of the accident, and would this evidence otherwise be admissible for any purpose?"

The section of the statute defining the offense in question is Section 8401(f), R. S. Mo. 1939, which provides:

"Leaving scene of accident: No person operating or driving a vehicle on the highway knowing that an injury has been caused to a person or damage has been caused to property, due to the culpability of said operator or driver, or to accident, shall leave the place of said injury, damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer." (Underscoring ours.)

Section 8404(c), R. S. Mo. 1939, provides for the penalty when the above quoted statute is violated.

In the case of State vs. Harris, 357 Mo. 1119, 212 S.W. (2d) 426, the Supreme Court was considering the sufficiency of the evidence in the case where the defendant was charged with leaving the scene of an accident under the above quoted section. In defining the crux of the crime, the Court, at S.W. 1.c. 427, said:

" * * * The crux of the crime with which defendant was charged and convicted was leaving the scene or place of injury without stopping and reporting the information as the statute requires. State v. Tippet, 317 Mo. 319, 296 S.W. 132; State v. Hudson, 314 Mo. 599, 285 S.W. 733. The offense was complete when the defendant, knowing a person had been injured, drove on without stopping and giving the information as required by the law. * * *"
(Underscoring ours.)

In the above case the Court clearly indicated that defendant's knowledge of the injury is a necessary element of the offense. It would logically follow that if the defendant did have knowledge of the injury inflicted on a person as a result of the accident that he would also have knowledge of the accident. As the Court held, "the offense was complete when the defendant knowing a person had

Honorable Homer F. Williams

been injured, drove on without stopping and giving the information as required by the law." Conversely, the offense would not have been complete had the defendant driven on without stopping and had not known that an accident had occurred and injury had been inflicted upon a person.

It is the rule in the construction of criminal statutes that they must be construed liberally in favor of the defendant and strictly against the state. Thus, in State vs. Dougherty, (Supreme) 216 S.W. (2d) 467, 471, it was stated:

"Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication.' State v. Bartley, 304 Mo. 58, 263 S.W. 95, 96; State v. Taylor, 345 Mo. 325, 133 S.W. 2d 336, 341. * * * "

Again in the Dougherty case, the Court was considering a prosecution for leaving the scene of an accident under Section 8401 (f), supra, and in construing the word "knowing" as it was used in the statute, the Court at l.c. 472, said:

" * * * We think the word 'knowing', as used in the statute, means actual knowledge rather than mere constructive knowledge, or such notice as would put one on inquiry, and more than mere negligence in failing to know, or the mere presence of facts which might have induced the belief in the mind of a reasonable person."

It would therefore appear that to sustain a conviction for leaving the scene of an accident, the defendant must have had actual knowledge of the accident and injury to person or damage to property as a result thereof. Under the facts which you have presented, it would seem that the defendant, being first notified of the accident a mile from the scene thereof, and that he did not actually know of its happening, would only amount to constructive knowledge thereof or such notice as would put him on inquiry. Under the Dougherty case, this would not be sufficient. Further keeping in mind that the statute in question must be liberally construed in favor of the defendant and strictly against the state, we believe that if the facts which you have presented would be the sole evidence in the case, then the defendant would not be guilty of the offense charged.

Of course, the question which you have presented is primarily a factual one, and had the defendant been stopped and notified of

Honorable Homer F. Williams

the accident at a place in closer proximity to the scene where he could have easily observed that an accident had occurred and then drove off without complying with the statute, a different opinion might be reached so far as warranting a prosecution for leaving the scene of an accident.

However, considering the facts which you have presented, in view of the recent decisions of the Supreme Court of Missouri we do not believe that the defendant is technically guilty of the offense with which you would charge him.

When the state has introduced evidence that the accident actually happened and that the defendant failed to stop, it is believed that the defendant's lack of knowledge is a matter of defense. If such defense is made, then the state on rebuttal might offer evidence of circumstances showing knowledge by the defendant of the accident. If when the defendant was informed of the accident his words and conduct were such as to constitute circumstances indicating his knowledge at the time of the accident, it would seem that such evidence would be admissible.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PROBATE COURT: The probate court cannot commit a person to a state
INSANE PERSONS: hospital for the insane for observation after a
hearing upon the sanity of a person.

January 6, 1950

Mr. Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

FILED

97

Dear Sir:

I.

We are in receipt of your letter of November 21, 1949, in which you request an official opinion from this office upon the following set of facts:

"We had a hearing before the Probate Court of this county relative to the sanity of a certain person, who was present in person and by attorney.

"The court took the matter of her sanity under advisement, but what he would really like to do is to send her to Farmington State Hospital for observation of Dr. Hocter, who is in charge of that hospital and who is considered an authority in this sort of case. The attorney for the defendant, however, will not consent for her to be sent there for observation.

"Does the court have the right to send her there for observation, before ruling on the matter, as he is in doubt as to just what he ought to do about the matter, but he would like to send her there for observation and the opinion of Dr. Hocter."

II.

Your letter does not state whether or not the alleged insane person was charged to be a poor person or a person with property sufficient to support herself at a state hospital. Since the adoption of the Constitution of Missouri in 1945, the probate court has jurisdiction over all insanity hearings so that we will consider the statute that applies in both situations.

Mrs. Homer F. Williams

Section 9328, as reenacted by the Laws of Missouri, 1945, page 905, provides, in part, as follows:

"The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto.* * *"

Section 447, R. S. Mo. 1939, and subsequent sections in Article XVIII of Chapter 1 of the Revised Statutes of Missouri, 1939, provide the procedure for inquiring into the sanity of a person by the probate court.

A leading case in Missouri on the procedure for the probate courts to follow in all insanity cases is *In Re Moynihan* (also known as *Higgins v. Hector*) 62 S.W.(2d) 410, 332 Mo. 1022, 91 A.L.R. 74. In this case Mrs. Moynihan was ordered on July 17, 1931, temporarily confined at the State Hospital No. 4 at Farmington, Missouri. The order is set forth in the statement of facts in said case. On August 7, 1931, the case was called for trial and an attorney appointed to represent Mrs. Moynihan; evidence heard, and judgment rendered committing her to State Hospital No. 4 at Farmington, Missouri without Mrs. Moynihan being present at the trial. The Supreme Court thoroughly considered all phases of this insanity inquiry and the court said, l.c. 415, 417, 418 and 419:

"An insanity hearing is not to be compared to a criminal trial. The purpose is entirely different. The person alleged to be insane is accused of no crime or wrong. He is suffering from a disease of the mind or nerves, and he, as much as any one, needs protection from its effects. It is not intended to deprive him of his property, but to afford a means of preserving it. It is not intended to deprive him of his liberty as punishment but for his own protection and the protection of others from acts which he would not knowingly commit. It is intended to preserve all of his rights of both liberty and property until he is able to exercise them. * * *"

* * * * *

"As to the right to arrest and restrain until hearing one who is so deranged as to endanger himself or others as done in this case, and as provided for by sections 498, 499, R. S. 1929

Mr. Homer F. Williams

(Mo. St. Ann. Secs. 498, 499) see notes 10 A.L.R. 488, and 45 A.L.R. 1464."

* * * * *

"* * * While the statutes covering the whole subject of insanity are constitutional and amply safeguard the rights of persons whose sanity is inquired into, the probate courts should observe the spirit as well as the letter of these laws. Acting under sections 498, 499, R.S. 1929 (Mo. St. Ann. Secs. 498, 499), it was proper for the court to order the temporary restraint and confinement of Mary E. Moynihan if it had reasonable grounds to believe that she was 'so far disordered in her mind as to endanger her own person or the person or property of others.' 'As the inherent jurisdiction of the state over persons of unsound mind rests in part upon its duty to protect the community from the acts of those who are not under the guidance of reason, it follows, * * * that if any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person, but only during so long a time as may be necessary to institute and carry to a determination proper proceedings to inquire into the party's condition and provide for his legal custody.' Buswell on Insanity, p. 33, Sec. 23. See, also, notes, 10 A.L.R. 488, and 45 A.L.R. 1464. But, even in such circumstances, it should be remembered that the preliminary order authorized by sections 498, 499, R.S. 1929, is not a valid final adjudication of the fact of insanity. The hearing provided by section 452, R.S. 1929 (Mo. St. Ann. Sec. 452), must still be had, and the person suspected of insanity still 'is entitled to be present at said hearing and to be assisted by counsel,' as stated in the notice required by section 450, R.S. 1929 (Mo. St. Ann. Sec. 450). The practice of sending a person to an insane asylum before the hearing might result in preventing the person claimed to be insane from employing counsel or being present at the hearing. Of course, there may be circumstances when such action is advisable and where there is no other suitable place available except at great expense, but such action should be

Mr. Homer F. Williams

taken with caution not to impair the rights of the alleged insane person. The probate court has statutory authority to call a special term (section 449, R.S. 1929, Mo. St. Ann. Sec. 449) when speedy action is necessary, and five days, under section 760, R.S. 1929 (Mo. St. Ann. Sec. 760), is ordinarily sufficient notice. See State ex rel. Terry v. Holtkamp (Mo. Sup.) 51 S.W.(2d) 13, loc. cit. 19.

"(11-15) However, such an order for temporary restraint, as made by the probate court here, is not binding upon the superintendent of a state hospital to keep the person confined until an order is made in that court for release. It is in no sense like a commitment in a criminal case for a definite term in jail or in the penitentiary. The person may lawfully be either discharged or paroled and set at liberty by the superintendent of his own motion at any time. Section 8629, R.S. 1929 (Mo. St. Ann. Sec. 8629). The hospital is a state institution. Chapter 46, articles 1 and 2, R. S. Mo. 1929 (section 8560 et seq. (Mo. St. Ann. Sec. 8560 et seq.)). The superintendent is one skilled in the treatment of mental diseases. Section 8578, R.S. 1929 (Mo. St. Ann. Sec. 8578). He is better qualified to determine a person's mental condition and the necessity for his confinement than the probate judge. He is a public officer, and improper action on his part will not be presumed. If the person confined desires counsel or to attend the hearing of which he has notice he has that constitutional right, and it would be the duty of the superintendent to allow it, even with the precaution of an attendant, if he thought that necessary. * * *

This case has been followed by the Supreme Court of Missouri in several subsequent cases and was cited in 98 Fed.(2d) 222 by the United States Court of Appeals. This latter court stated in the case of Barry v. Hall, 98 Fed(2d) 1.c. 230 as follows:

"It is settled that the detention for a brief period of one who is as a matter of fact insane while proper proceedings are being instituted to determine his insanity as a matter of law is not unlawful."

Mr. Homer F. Williams

On April 27, 1949, this office rendered an opinion to Judge Franklin W. Long of the probate court of Bates county in which we held that the state hospitals are not available as places of confinement of dangerous insane persons before they have been adjudicated insane by the court. This opinion was based on the fact that sections 9323, 9324, 9325 and 9328, R. S. Mo. 1939, reenacted Laws of Missouri, 1945, p. 905, do not provide authority for the superintendent of a state hospital to receive patients, pending a sanity hearing, from the sheriff who has been ordered to apprehend and confine an alleged dangerous insane person in some suitable place.

Section 9336, as reenacted Laws of Missouri, 1945, page 905, provides that if the alleged insane person is charged to be so deranged as to endanger himself and others or would be dangerous to the safety of the community by being at large and is not being confined or restrained that the judge or clerk of the probate court may issue a warrant authorizing the sheriff to apprehend such alleged insane person and confine him or her in some suitable place for such time as may be necessary to carry to a determination the proceedings to inquire into the condition of the said alleged insane person.

Sections 497 and 498, R. S. Mo. 1939, and formerly Sections 498 and 499, R. S. 1929, provide that if a person be so far disordered in his mind as to endanger his own person or the person or property of others any judge of a court of record may cause such insane person to be apprehended and employ any person to confine him or her in some suitable place until the probate court shall make further orders therein.

But, after the hearing has been held on the question of whether or not the person is insane the person cannot be temporarily confined in a state hospital for observation in order to have the physicians of the state hospital to determine the sanity or insanity of the person and then testify at a subsequent hearing. The Supreme Court pointed out in the Moynihan case that the rights of a person charged with insanity shall be carefully preserved. We do not believe that it would be fair to the alleged insane person to continue the trial after hearing most of the evidence to allow the informants to obtain more evidence of the mental condition of the alleged insane person. It is true that the prime purpose of an insanity proceeding is to provide for the welfare of the person alleged to be insane and to preserve his property and the safety of the public (Boatmen's National Bank of St. Louis v. Wurdeman, 127 S.W.(2d) 438, 344 Mo. 573.

But the probate court should find the person sane or insane at the time of the hearing according to the evidence that has been introduced on the day set for trial. If the person is found to be insane by the probate court and is committed to the state hospital then, if the superintendent of said hospital finds the

Mr. Homer F. Williams

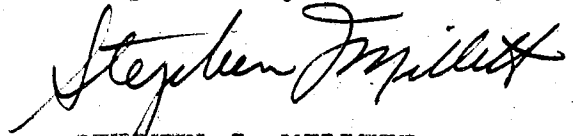
person to be sane, such superintendent has the power, under Section 9321, as reenacted Laws 1945, page 905, to discharge or parole such person, or a proceedings may be held in the probate court as provided in Section 492, R. S. Mo. 1939, in which the probate court may find that the person committed has been restored to his right mind and order his discharge. This relief can be requested by the person committed at any time.

III.

CONCLUSION

It is, therefore, the opinion of this office that the probate court cannot commit a person to a state hospital for the insane for observation after a hearing upon the sanity of a person.

Respectfully submitted,



STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



SJM:mw

SCHOOL ELECTIONS) Clerks and judges of elections serving in
AND ELECTIONS:) dual capacity as clerks and judges for school
election and special gas tax referendum
election are entitled to compensation in same
manner as though said election were conducted
separately.

March 14, 1950



Hon. David W. Wilson
Prosecuting Attorney
Lewis County
La Belle, Missouri

Dear Mr. Wilson:

We have your recent letter requesting an official opinion of this department. The sole question embodied in your opinion request is as follows:

"If the same judges and clerks are used in both the annual school election and the special gas tax referendum election, would they be entitled to be paid for services at each of the elections or only for one election?"

There is no statute or reported decision by a court of this State directly concerned with the particular question embodied in your opinion request. However, Section 10681, R. S. Mo. 1939, applicable to school elections in cities containing more than 75,000 and less than 500,000 inhabitants provides in part as follows:

"* * * * the judges and clerks of such municipal elections shall act as judges and clerks for such elections for school directors and the submission of such questions, but the ballots for directors and upon such questions shall be on separate pieces of paper and deposited in a separate ballot box kept for that purpose;
* * * * *." (Underscoring ours)

Section 10483, Laws of Missouri 1943, page 885, provides in part as follows:

Hon. David W. Wilson

"* * * * in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants in other counties, said elections shall be held at the same time and places as the election for municipal officers, and the judges and clerks of such municipal election shall act as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose.
* * * *" (Underscoring ours)

It will be noticed that the above quoted provisions require only the judges and clerks of municipal elections to serve as judges and clerks of school elections. Such persons are therefore actually serving in only one capacity, namely, as judges and clerks of the municipal and school election. In the present instance, however, persons who are appointed by the county court to serve as judges of the special referendum election may also be appointed by the school board to serve as judges of the school election; such appointments are discretionary with the school board and the judges so appointed are actually serving in a dual capacity, that is as judges of the special referendum election and as judges of the school election. The same reasoning would apply to the clerks employed and used for the said elections.

Therefore, it is our view that the judges and clerks of election who serve by appointment in the referendum election and by appointment in the school election are entitled to compensation for such services for each election.

CONCLUSION

It is, therefore, the opinion of this department that clerks and judges of election in Lewis County serving in the dual capacity of clerks and judges of election for a school election and the special referendum election on the State Gasoline Tax are entitled to be compensated for their services in the same manner as though the said elections were conducted entirely separate and apart from each other.

Respectfully submitted,

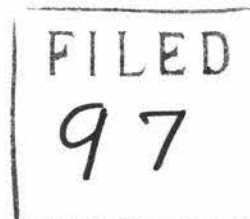
PHILIP M. SESTRIC
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SUMMONS AND SHERIFFS: When a suitable person is designated to execute summons under the provisions of Section 28, Laws of Missouri 1945, pages 778 and 779, the summons may be directed to the sheriff or the person designated to execute the summons.

March 15, 1950



Hon. Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Wilson:

We have your recent letter requesting an official opinion of this department. Your opinion request and the question raised therein reads as follows:

"I respectfully request the opinion of your department on the following question:

"When a suitable person other than the Sheriff is designated to execute summons, under the provisions of Section 28, Senate Bill 207 (Pages-778-779, Laws Missouri, 1945), should the summons be directed to the Sheriff or to the other suitable person designated to execute the summons?"

Section 28, Laws of Missouri 1945, page 778 and 779, provides for the designation of a suitable person other than the sheriff to execute summons and reads as follows:

"Every magistrate, or clerk of the magistrate court, upon being satisfied that any original summons issued out of his court will not be executed for want of an officer to be had in time to execute the same, or in all cases where the sheriff is a party to the pending suit, or is otherwise interested in the determination thereof, or to save mileage expense, may empower any suitable person designated by the plaintiff not being a party to the suit, to execute the same, by endorsement upon the process to the following effect: 'At the request and risk of the plaintiff, I authorize
..... to execute

Hon. Robert P. C. Wilson, III

(
(E. F. Magistrate)
this writ. () 'and the person
()
(Clerk of the Magistrate Court)

so empowered shall thereupon possess all the authority of a sheriff in relation to the service of such summons, and shall be subject to the same obligations, and shall receive the same fees for his services, except mileage."

A statute similar to all material provisions of the above quoted statute and upon which our courts have ruled can be found in Section 20, Revised Code of Missouri, page 352 and in Section 2583, Missouri R. S. A. 1939. The court construed the above designated statute in the case of Hart v. Robinett, 5 Mo. 11, and held that the said statute permitted summons to be directed to any suitable person designated to execute the said summons saying on page 16:

"It is further insisted by the appellant, that the summons was not directed to, or executed by, any officer or person authorized to execute the same. The summons was directed to John Martin; the appellant insists that it should have been directed to the constable. This could not have been the intention of the law-making power. The statute requires the summons to be issued against the constable; and if issued against him, of course it ought not to be directed to him. It would be as unwise to entrust a delinquent officer with process against himself, as it would be to make a man judge of his own cause. In regard to the execution of the writ, the language of the statute is explicit enough. It provides that 'every justice issuing any process authorized by this act, upon being satisfied that such process will not be executed for want of an officer to be had in time to execute the same, may empower any suitable person, not a party to the suit, to execute the same, by an endorsement on such process to the following effect: "At the request and risk of the plaintiff, I authorize _____ to execute and return this writ' -- Rev. Code, 352, § 20. If the justice be satisfied that no

Hon. Robert P. C. Wilson, III

officer can be had in time to execute the writ, he shall empower some suitable person to do it. (a) The case before us a still stronger one. Here no officer could be had at all, and of course, none in time. But the justice cannot empower a person to serve process without the endorsement required. * * * *

It will however, be noticed that neither the magistrate nor the clerk of the Magistrate Court can empower a person to serve process without the required endorsement being made upon the summons.

Applying the principles enunciated by the court in the case of Hart v. Robinett, 5 Mo. 11, page 16, to the question here at hand it would seem to follow that in those instances wherein the summons is to be issued against the sheriff it should as a practical matter be directed to the suitable person designated to execute the same, and in those instances wherein a suitable person is designated to execute the summons as a matter of expediency, the summons may be directed to either the sheriff or the person designated, by the court or the clerk of the court, to execute the same.

CONCLUSION

It is, therefore, the opinion of this department that when a suitable person other than a sheriff is designated to execute summons under the provisions of Section 28, Laws of Missouri, 1945, pages 778 and 779, the summons should be directed to such designated person in all instances where the said process is to issue against the sheriff, and in those instances wherein the summons is to issue against any other individual the said summons may be directed to either the sheriff or to the person designated to execute the said summons. The summons should be endorsed as provided by law.

Respectfully submitted,

PHILIP M. SESTRIC
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ASSAULT:

The shooting and the subsequent striking over the head with a deadly weapon constitutes two separate offenses.

May 3, 1950



Honorable Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"Recently a case occurred in this county in which a resident of the county shot his neighbor in the leg with a shot gun inflicting a very severe wound in the leg. Shortly thereafter a nearby witness came up to the scene of the shooting, and at that time the party who did the shooting was striking the wounded man with his fists and abusing him by cursing him, and the wounded man was lying helpless in the roadside.

"The witness prevailed upon him to desist and then went about one quarter of a mile away to get help.

"While he was absent and before he returned with help, the defendant struck the wounded man over the head with the gun, making a bad wound upon his head, and the witness knows that the wound was not on the head when he went to get help, and the wounded man was helpless in the road all this time.

Hon. Homer F. Williams

"In your opinion would the shooting and the striking over the head with the gun, constitute one offense, so that it could be charged in one count or would it be duplicious to charge it in one count and would it constitute two separate offenses or can I charge it in one count?"

In the above circumstances there are two distinct offenses. The first was the shooting. After the shooting an appreciable time had elapsed before the assault was made by striking upon the head with the gun.

Section 4408, R. S. Mo. 1939, states:

"Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years."

In the case of State v. Harris, 209 Mo. 423, 1. c. 435, the court quoted the above section and in its discussion stated:

"In State v. Bond, 191 Mo. 555, 1. c. 568, this same distinction is maintained between the clause in the statute which makes the shooting at or stabbing another offense, and an assault with a deadly weapon, another and distinct offense. See also State v. Webster, 77 Mo. 566; State v. Painter, 67 Mo. 84; State v. Wood, 124 Mo. 412; State v. Hoffman, 78 Mo. 256. * * *"

In Robinson v. U. S. 143 Fed. (2d) 276, 1. c. 277, it is stated:

"The same transaction may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. * * *"

Hon. Homer F. Williams

CONCLUSION

It is the conclusion of this department that the shooting and striking over the head with the gun constitute two separate offenses, which may be charged in two informations or in two counts of one information.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ROADS AND BRIDGES:

Special road districts formed May 1, 1950 must vote special taxes authorized by Section 8529, Mo. R.S.A., before taxes may be collected for such district.

TAXATION:

May 22, 1950

5/25/50

Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"On May 1, 1950, Farley Road District of Platte County, Missouri, was formed under provisions of Article 11, Chapter 46, Section 8711 and following. The area included in this district was, until May 1, 1950 part of a common county road district. Prior to formation of Farley Road District of Platte County, Missouri, and while the area was a part of a common county road district, additional thirty-five cent levy was voted under provisions Section 8529 and following, Laws, Missouri, 1945, Pages 1480-1481. Is it now necessary for Farley Road District of Platte County, Missouri to vote on this additional thirty-five cent levy or does the original levy voted stand?"

Section 8529, House Bill 337, 65th General Assembly, provides in part as follows:

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call

May 22, 1950

an election in such district for the purpose of voting for or against the levy of the tax provided for in the second sentence of the first paragraph of Section 12 of Article X of the Constitution of Missouri, it shall be the duty of the county court, upon the filing of such petition, to call such election forthwith to be held within 20 days from the date of filing such petition. * * *

Section 8711, Missouri R.S.A., 1939, which refers to special road districts authorized by Article 11, Chapter 46, Revised Statutes of Missouri, provides in part as follows:

" * * * Whenever an order is so made incorporating a public road district such district shall thereupon become, by the name mentioned in such order, a political subdivision of the state for governmental purposes with all the powers mentioned in this section and such others as may be conferred by law."
(Emphasis ours.)

Section 8714, Revised Statutes of Missouri, 1939, provides as follows:

"The county court shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give a receipt, and such commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers,

May 22, 1950

and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

From the above quoted provisions, it is clear that the special road district organized May 1, 1950, is a political subdivision of the state and constitutes a distinct and separate entity from the common road district out of which it was formed. Since the special tax authorized by Section 8529, supra, was voted only for the common road district, the election confers no authority for levying such tax by the special road district. The election authorized by Section 8529, supra, must be held in the special road district if a special road tax is to be collected for such special road district.


CONCLUSION

It is the opinion of this office that when a special road district was formed under the provisions of Article 11, Chapter 46, Missouri R.S.A. 1939, on May 1, 1950, out of area that was formerly in a common road district and which common road district had voted a special levy authorized by Section 8529, House Bill 337, 65th General Assembly, that the tax so voted cannot be collected on land located within the special road district unless the election authorized by Section 8529 is held within the special road district and such a tax is authorized at such an election.

Respectfully submitted,

Approved:

C. B. BURNS, JR.
Assistant Attorney General


J. E. TAYLOR
Attorney General
CBB:hr:lrt

SCHOOL BUILDING AND EQUIPMENT: (1) The word equipment as used in Section 13, (S.B. 307) Laws Mo. 1947, Vol. 2, page 376 means whatever is necessary to equip a new central school building or any addition to a present building owned by the re-organized district for its use as an educational establishment. (2). School busses and school playground equipment would not be included in the definition of equipment because the same does not relate to the use of a school building or its efficient function. (3). Said Act does not contemplate leasing of a building for use as an educational establishment and therefore would not apply to the purchase of equipment for use in a leased school building.

June 21, 1950



Honorable Homer F. Williams
Prosecuting Attorney
Marble Hill, Missouri

Dear Sir:

I.

This will acknowledge receipt of your recent request for an official opinion of this office upon the following questions in reference to Section 13, S.B. No. 307, Laws Mo. 1949, Vol. 2, page 370-377:

"The county superintendent of schools of this county would like an opinion on the following matter:

"Reference to Section 13, Senate Bill #307, Vol. 2, Mo. Laws 1947, at page 376.

"1) Is the word equipment to be interpreted as equipment of the building of school equipment, or re-organized district equipment?

"2) Would school busses and school playground equipment be included or excluded?

"3) Could equipment such as "School desk and other movable property" be used in the buildings leased but not owned by the District?

Honorable Homer F. Williams

"a) Could the state apply aid on such equipment intended for such use?

"(Equipment that might become a part of the building, such as blackboard is not referred to here)."

Section 13, of S.B. 307, Laws Mo. 1947, Vol. 2, pages 370-377, provides as follows:

"In all school districts enlarged under the provisions of this act, in which the erection of a new central school building or any addition to present building so selected by reason of consolidation is a part of the approved plan, state aid shall be provided in the amount of one-half of the cost of said building and equipment but the total state aid for this purpose shall not exceed twenty-five thousand dollars (\$25,000) for any enlarged district. All building plans shall be approved by the State Board of Education."

The Legislature did not define what is meant by the term "school building" and therefore a question of what sort of a building would be necessary or useful for the purpose of conducting public education is left to the determination of the school board of the enlarged school district.

In *Young v. Lindwood School District*, 97 S.W.2d. 627, the Supreme Court of Arkansas defined school house as a building which is appropriated for the use of a school or schools or as a place in which to give instruction, and said as follows:

"School, a place for instruction in any branch or branches of knowledge. * * *"

The court in this case had the question of the power of the school district to build a gymnasium to provide for the physical culture of the pupils and also to provide rooms in the building for home economics and vocational agriculture, shower baths, dressing rooms and indoor toilets with concrete walks around said building connecting said building with buildings now belonging to and in use by said district. The Arkansas statute provides:

"* * * All school districts are authorized to borrow money and issue negotiable coupon bonds for the repayment thereof from school funds, for the building and equipment of school buildings,

Honorable Homer F. Williams

making additions and repairs thereto, purchasing sites therefor, and for funding any indebtedness created for any purpose and outstanding at the time of the passage of this Act, as provided in this act.' * * *

The court further held:

"* * *We think this language confers specific power and authority on school districts to construct buildings such as the one involved in this litigation. A gymnasium may be said to be an indoor playground or an indoor athletic field or an indoor stadium. Webster defines a 'stadium' in one definition to be: 'A similar modern structure, with its enclosure, used for athletic games, etc.' Moreover, the language at the conclusion of the above sentence, 'other necessary uses incidental to the maintenance of schools and the welfare of teachers and pupils,' is broad enough to include the power here as-sorted. Moreover, a part of the purpose of the proposed building is to provide rooms therein for Home Economics, and Vocational Agriculture. These are subjects which are taught in many schools and are so authorized in section 189 of the same act(page 580)."

* * * * *

"We cannot agree with appellant that the words 'school buildings' as used in section 59 of said act, especially in view of the other provisions of the act, should be restricted to such buildings as are used exclusively for mental training or for the teaching of such subjects as are ordinarily taught in the public schools. We think it just as important that children should be developed physically and morally as it is that they should be developed mentally. Our conclusion is that the directors and the district had the power and authority to accomplish the purpose undertaken in this case."

In Farm and Home Savings and Loan Association of Missouri vs. Empire Furniture Company, 87 S.W.2d. 1111, 1.c. 1112; the Texas court said:

Honorable Homer F. Williams

"* * * 'Equipment' has been defined as 'what-ever is used in equipping; the collective designation for the articles comprising an outfit.' The equipment of an apartment house may, in a broad sense, be held to include the furniture. * * *"

In line with the Texas case it is our opinion that the term equipment as used in said Section 13 includes school furniture, school desks, black boards and other articles of an enduring and permanent quality.

In the case of State ex rel. Building Commission vs. Smith, 81 S.W. 2d. 613, 336 Mo. 810, the Supreme Court of Missouri was asked to construe the following section:

"* * * All improvements, repairs or additions which may be made to any of the state eleemosynary or penal institutions under this act, shall be of fireproof construction throughout, and shall be provided with proper heating, lighting and ventilating facilities and with the most modern approved sanitary arrangements and equipment.' (Italics ours.) Laws of Missouri, Extra Session, 1933-34, pp. 109, 110 (Mo. St. Ann. Sec. 13748g, p. 6521). * * *"

The relators in the case contended that the word equipment in said Act embraced such items as (1) steel chairs, bedside tables, wheel chairs; (2) knives, forks and spoons (3) electric irons, canvas baskets (4) Colonic irrigation outfits; (5) forge, hand drill. At l.c. 614 and 615, the court said:

"* * * The term 'equipment' clearly modifies 'sanitary arrangements' and we submit that what the Legislature had in mind was sanitary equipment, and not equipment as the term is generally defined when standing alone.' Obviously the question tendered by the parties is one of statutory construction."

* * * * *

"* * * Were we to hold that the term 'equipment,' as used in the statute, is to be construed in its usual and ordinary sense, it would admittedly include the items in question, and our alternative writ would have to be made permanent, if decided on the statute."

Honorable Homer F. Williams

But if a proper construction of the restrictions placed upon the purposes by the constitutional amendment excludes equipment in its general and ordinary sense, an entirely different result would necessarily follow.* * *

* * * * *

"In our search, we found a case decided by the United States Circuit Court of Appeals for the Eighth Circuit, Midland Special School District v. Central Trust Co., 1 F(2d) 124, 127, which, upon a cursory examination, seemed to at least give color to the claim that the proceeds of a bond issue for the purpose of 'erection, alteration or improvement of (school) buildings' might be expended, in part, in purchasing equipment. In that case the court said: 'In determining what is "equipment" we should have clearly in mind the subject which is being equipped. In this case it was a schoolhouse, and we think a schoolhouse would be in modern times incomplete without many of these things commonly termed "equipment." In our opinion the expression "the erection, alteration or improvement of such buildings" (school buildings), would fairly include many things which are commonly called "equipment."'. (Italics ours.) But upon an analysis of the case, it is perfectly clear that it is no authority for the proposition with which we are confronted."

* * * * *

"There is a well-settled rule applicable to a grant of power to a corporation, municipal or otherwise, recognized in this state, and elsewhere, that if any doubt arises out of the use of words employed, it is to be resolved in favor of the public and in limiting the expenditures of the appropriation to the express terms for which it was made. Meyer v. Kansas City, supra. But can it be said to be doubtful as to whether equipment of the character hereinbefore described comes within the purposes of a bond issue to 'repair, remodel or rebuild public buildings devoted to eleemosynary and penal purposes, and for building additions thereto, and additional buildings where necessary?' We think not."

Honorable Homer F. Williams

There is nothing in the language used to indicate an intention on the part of the voters to authorize the expenditure of the bond money for the purposes in question and we accordingly hold that equipment of the character mentioned does not come within the terms of the constitutional amendment. Our alternative writ, having been improvidently issued, should be quashed. It is so ordered."

It is also our opinion that the term equipment in the phrase building and equipment as used in said Section 13 clearly modifies "building" and that the Legislature had in mind the use of the word equipment in its general and ordinary sense as relating to school buildings and the use of such school buildings. A school building without heating equipment; plumbing equipment, electrical equipment and ventilating equipment would be of no use for educational purposes.

Said Section 13 provides state aid for the erection of a new central school building or any addition to a present building for the purpose of encouraging and aiding the construction of building that will be needed by such enlarged districts. It does not contemplate or provide for the leasing of buildings to be used for school purposes.

The court said in 223 S.W.(2d) 448, State v. Pretended Consolidated School District #1 of Montgomery County.

"The meaning of statutes and particularly the meaning of school statutes may not be found in a single sentence, but in all their parts and their relation to the end in view or the general purpose. * * *"

You will notice that said Section 13 of said S.B. 307 uses the word "erection" of a new central school building or any addition to the present building. Webster's New International Dictionary, 1940 Edition, defines the word erect to be as follows: "To raise, as a building; build; to construct." Also in 21 C.J., page 820, we find this paragraph:

"ERECTION. The term, as used with reference to building, means the putting together of the materials that are used therein; putting together the necessary material and raising it; the putting together of the brick and mortar, wood, and other materials making the construction; construction. It may imply some structure superimposed on the land."

Honorable Homer F. Williams

It is our opinion that a definition of the word "erection" (of a new central school building or any addition to present building) would not include the leasing of an existing building for use as a school house.

The general purpose of said S.B. 307 was to provide for enlarged school districts in order that better educational programs and facilities may be furnished to the students. You will note that Section 13 of said Act provides in the last line "all building plans shall be approved by the State Board of Education." The Act also provides that the state aid shall be in the amount of one-half of the cost of said building and equipment but not to exceed \$25,000. It does not contemplate the leasing of a building for use as a school house or building.

CONCLUSION

(1) It is the conclusion of this department that the word equipment as used in Section 13, (S.B. 307) Laws Mo. 1947, Vol. 2, page 376, means whatever is necessary to equip a new central school building or any addition to a present building owned by the reorganized district for its use as an educational establishment.

(2) School busses and school playground equipment would not be included in the definition of equipment because the same does not relate to the use of a school building or its essential function.

(3) The Act referred to above does not contemplate the leasing of a building for use as an educational establishment and therefore would not apply to the purchase of equipment for use in a leased school building.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

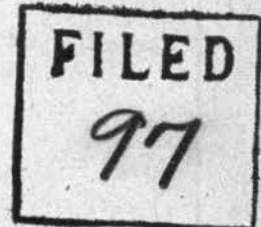
J. E. TAYLOR
Attorney General

ELECTIONS) No vote may be counted in primary for unopposed
) candidate unless X is placed before name. Marking
) off name of unopposed candidate does not invalidate
) ballot as to other offices.

August 9, 1950

8/14/50

Honorable Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"With regard to the interpretation of the primary election laws in this state, I would like your opinion on the application of same to the following specific instances, namely:

"1). A voter votes his party ticket in the primary, but does not put a cross in the square in front of the name of an unopposed candidate for office, does this count for this candidate?

"2). A voter runs a line thru the name of an unopposed candidate on his party ticket. Does this ticket count for the other candidates for whom he expresses choice on his ticket, or does this invalidate the whole ticket so that it has to be thrown out?"

Section 120.45 of House Bill No. 2057, Sixty-fifth General Assembly, provides in part as follows:

" * * * At the head of each such ticket, immediately following the date of such election, shall be printed the following:
'Instruction to voters: Place an X in the square opposite the name of the person for whom you wish to vote'. The voter

Honorable Homer F. Williams

shall cast his vote in accordance with
this instruction and shall vote in no
other manner. * * *

This provision clearly requires a voter to place an X in the square opposite the name of a person for whom he wishes to vote. Should no X be placed in the square opposite a person's name, no vote may be counted for such person under this section although the candidate is unopposed. There is no provision for voting straight tickets in the primary election similar to that found in the laws regarding general elections.

As for your second question, there is no provision in the primary election laws which renders void the marking of a ballot in such a way as to obliterate the name of a candidate which appears on such ballot. In view of the absence of such provision, we feel that the ballot should be counted for the other persons for whom votes have been legally cast on the ballot. As stated by the Supreme Court of Missouri in the case of Nance v. Kearbey, 251 Mo. 374, 1. c. 383, " * * * The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. * * *"

There being no such statutory provision, we feel that the irregularity about which you inquire does not invalidate the entire ballot.

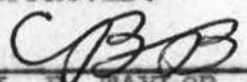
CONCLUSION

Therefore, it is the opinion of this department that when a voter votes his party ticket in the primary, but does not place an X in the square in front of a name of an unopposed candidate for office, no vote may be counted for such candidate.

We are further of the opinion that when a voter obliterates the name of an unopposed candidate on his party ticket, this does not invalidate the entire ballot, but it may be counted for the other candidates for whom he expresses choice on his ticket.

Respectfully submitted,

APPROVED:


J. E. TAYLOR
Attorney General

ROBERT R. WELBORN
Assistant Attorney General

RRW/feh

RESTORATION OF RIGHTS
OF CITIZENSHIP BY
DISCHARGE FROM PAROLE:

Person paroled by a circuit court when found guilty of penitentiary offense and thereafter discharged from parole, is restored thereby to rights of citizenship including the rights of suffrage.

October 13, 1950



Mr. Homer F. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"Some ten years ago, a party was convicted of felonious assault before the Judge of the Circuit court and upon a plea of guilty to assault with intent to kill, was sentenced to 5 years in the Missouri state Penitentiary, but being of good character, the court paroled him, and he made his reports until he was finally discharged by the court, some 4 years ago.

"Some question his right to vote since his parole was terminated, but it would seem that under the Provisions of Sec. 4210, that when he is finally discharged under the parole provisions that automatically he would be restored to all the rights and privileges of citizenship, without any restoration by the Governor of such rights, and his right to vote is in question.

"Does he have the legal right to vote under the above circumstances?"

In considering the question as to whether or not the man mentioned in your opinion request is entitled to vote under the circumstances recited in said letter, we have considered the sections of the Missouri statutes which relate to the loss of citizenship and the rights incident thereto as a result of a

Mr. Homer F. Williams

sentence of imprisonment in the penitentiary.

Section 9225, R.S.A. Mo. 1939, is as follows:

"A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

We also quote Section 9227, R.S.A. Mo 1939, as follows:

"When any person shall be sentenced upon a conviction for any offense, and is thereby according to the provisions of this article, disqualified to be sworn as a witness or juror in any cause, or to vote at any election, or to hold any office of honor, profit or trust within this state, such disabilities may be removed by a pardon by the governor, and not otherwise, except in the case in the next section mentioned."

Section 4199, provides for the parole by the circuit and criminal courts and the respective boards of parole serving such courts of persons convicted of a violation of the criminal laws of this state, in the following language:

"The circuit and criminal courts of this state, the court of criminal correction of the city of St. Louis and boards of parole created to serve any such court or courts shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

The sections which follow the last above quoted section up to and including Section 4211, R.S.A. Mo. 1939, contain the provisions by which such courts and their respective parole boards are to be regulated or governed in granting and terminating paroles or discharging persons therefrom.

Section 4210, R.S.A. Mo. 1939, the section mentioned in your opinion request is as follows:

"Any person who shall receive his final discharge under the provisions of sections

Mr. Homer F. Williams

4199 to 4211 inclusive, shall be restored to all the rights and privileges of citizenship."

We now advert to Section 9227, R.S.A. 1939, supra, for the purpose of discussing the question as to whether it conflicts with Section 4210, R.S.A. Mo. 1939, supra. The aforesaid section 9227 insofar as pertinent provides as follows:

"When any person shall be sentenced upon a conviction for any offense, and is thereby according to the provisions of this article, disqualified to be sworn as a witness or juror in any cause, or to vote at any election * * * such disabilities may be removed by a pardon by the governor, and not otherwise, * * *"

We now point out that the only provisions of the article mentioned in the last above quoted section which provide for the disabilities mentioned in said section including the loss of the right to vote are contained in Section 9225, R.S.A. Mo. 1939, supra, which provides in substance that a sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the person so sentenced during the term thereof.

While there is a seeming conflict between the provision that such disability can be removed only by pardon and the provision in Section 4201 R.S.A. Mo. 1939, to the effect that: "any person who shall receive his final discharge under the provisions of Sections 4199 to 4211, inclusive, shall be restored to all of the rights and privileges of citizenship" we are, nevertheless, of the opinion that there is no actual conflict for the reason that the Supreme Court of Missouri in the case of Ward v. Morton, 294 Mo. 418, in construing the section now numbered 9225 has strongly indicated that the expression "sentence of imprisonment" mentioned in Section 2291, R.S. Mo. 1919, now 9225, R.S.A. Mo. 1939, supra, has reference only to cases where the person convicted has been actually imprisoned. The following is a quotation from the opinion of the Court, l.c. 419:

"* * *It would accordingly seem to follow that the sentence of imprisonment mentioned in Section 2291 has reference only to cases where the person convicted has been actually imprisoned and not to a case where he is at liberty under an unterminated parole."

The case in which the opinion above quoted from was rendered was a case involving the alleged disability of the person convicted to execute a valid deed and the court held that since the convicted

Mr. Homer F. Williams

person had not been actually imprisoned he had not lost the right to execute a deed by reason of Section 2291 R.S.Mo. 1919, now Section 9225, R.S.A. Mo. 1939. While the court did not go so far as to specifically hold that the fact that the convicted person had never been imprisoned kept each and every disability mentioned by the statute from applying to him, we are of the opinion that if the right of the convicted person to vote had been in issue instead of his right to make a deed the court, in applying the logic of the above quoted opinion, would have held that the convicted person had not lost the right of suffrage under the section mentioned. We are accordingly of the opinion that there is no conflict between the provisions of Sections 9225 and 9227 R.S.A. Mo. 1939, on the one hand and Section 4210, R.S.A. Mo. 1939, on the other. However, we are of the further opinion that even if there is such a conflict, Section 4210 R.S.A. Mo. having been enacted later than Sections 9225 and 9227, supra, had the effect of repealing the two sections last mentioned to the extent of the conflict. For support of our view in this regard we quote as follows from the opinion of the Supreme Court of Missouri in the case of State ex rel. v. Clayton, 226 Mo. 292:

"Where two general statutes are in irreconcilable conflict, the one of later date must prevail, but if the two are susceptible of a construction that will give force to both, they must be so construed. And where the validity of a statute is assailed we must uphold it if it is susceptible of a construction that will render it valid."

We are of the opinion that there is nothing in any of the sections hereinabove quoted other than Section 4210, which limits the effectiveness of the very definite provisions of said section 4210, supra, in the matter of the restoration of all of the rights of citizenship including the right to vote in cases in which the provisions of Sections 4199 to 4211, inclusive, have been fully complied with in the granting of paroles and in the discharge from paroles.

CONCLUSION

We are therefore of the opinion that the man mentioned in your opinion request as having been paroled and finally discharged four years ago is now entitled to vote since under the provisions of Section 4210, R.S.A. Mo. 1939, all of the rights and privileges of citizenship have been restored to him.

APPROVED:

Respectfully submitted,

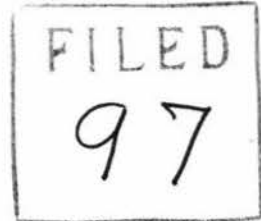
J. E. TAYLOR
Attorney General

SAMUEL M. WATSON
Assistant Attorney General

ROADS AND BRIDGES:
BOUNDARY:
COUNTY:

Authority of County Court of Platte County
to build and maintain roads on land formerly
in Kansas and now in Missouri.

October 17, 1950



Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion. In view of the fact that there has been considerable correspondence relative to this request, for the sake of brevity we shall restate your request.

You inquire specifically if the County Court of Platte County, Missouri, may in its discretion build and maintain roads in an area which is now located in Platte County but which area was formerly located in the State of Kansas prior to recent litigation in the Supreme Court of the United States wherein the two states participated in a dispute as to the boundary line between said states, and subsequent action of the respective legislatures of said states agreeing as to a boundary line between said states, and action of Congress ratifying said legislation.

We will herein attempt to state as briefly as possible some of the facts relevant to your request. In *State of Kansas v. State of Missouri*, reported in 88 L. Ed. 1234, the Supreme Court of the United States heard a dispute between the states of Kansas and Missouri as to the true boundary line between said states. Both states were claiming jurisdiction and sovereignty over certain land near said boundary line. In deciding this dispute the Supreme Court said, 88 L. Ed. 1.c. 1238:

"From the recital thus far it is clear that in 1900 the land which then lay where the disputed tract now lies was Missouri land. This is undisputed. Likewise, the tract now is attached to Missouri on the easterly bank of the river. This is because the Missouri channel dried up during some five to eight years beginning around 1927 or earlier. But, before that process began, for many years the land in question lay between the two

Honorable Robert P. C. Wilson, III

channels. And it is from conflicting views concerning whether, how and when these major changes took place the parties derive their respective claims to sovereignty over this soil."

The court further said at l.c. 1244 and 1245:

"Kansas' evidence concerning the division of flow and formation of the island, together with that concerning the drying up of the Missouri channel, also proves not that the river suddenly cut a new channel through accreted soil in 1927, but that it merely shifted the volume of flow from one channel to another preexisting one. In other words it goes to disprove both accretion and avulsion. Missouri and Kansas witnesses are agreed that the main flow was in the Kansas channel from 1927 on and there is substantial agreement that by 1933 or 1935 the Missouri channel had dried up, except for the flow of Mill Creek Ditch, and largely had filled up by deposits from that stream and other forces. Missouri witnesses say this drying up began before 1927, some as early as 1922 or 1923, and therefore continued for ten or twelve years. Kansas witnesses generally say it began in 1927 and continued for from three to seven or eight years. Only a few of them say the ice jam that year cut a new channel. More testify that the main flow then shifted from one channel to the other, and some join the witnesses for Missouri in saying that this shift began earlier. Except for the few witnesses who testify to the sudden cutting of a new channel, the great weight of the testimony is that whatever change occurred in reduction of the flow in the Missouri channel required several years to complete. It was a gradual process, and therefore not the sudden shift necessary to show avulsion. We need not decide what the effect would be if the evidence had shown this was a gradual cutting of a new channel. It was at most a gradual shifting from one to another. Kansas clearly has failed to prove that there was a single channel of the river which gradually moved over to the farthest erosion point, meanwhile accreting this

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land to her soil, then suddenly moved back, either in 1917 or in 1927, to a new channel cut through the accreted soil. Only by accepting the evidence given by the few witnesses who supported this theory, which was contradicted both by the weight of her own evidence concerning island formation and by substantially all that was offered for Missouri, could a finding in Kansas' favor be made under the theory of accretion and avulsion.

* * * * *

" * * * His judgment accords with the conclusions we make from our own independent examination of the record. It is not necessary for us to decide more than that Kansas has failed to show that the main channel of the river shifted at any time in question from a course such as the river now follows, or one slightly closer to the Kansas bluffs, to one following the course of the Missouri channel when the flow was divided.

"It follows the land in dispute must be awarded to Missouri and the boundary will be fixed as the master has recommended in his report. A decree will be entered accordingly."

Thereafter, the United States Supreme Court entered its decree upon the above finding, which decree is reported in 64 S. Ct. 1202 and sets forth the dividing line between the two states by metes and bounds in some five or six pages, and concludes as follows:

"Both States having requested postponement of entry of an order directing the placing of suitable monuments or markers on the above designated boundary until they have had opportunity to consider exchanging certain lands and to make such exchanges, jurisdiction of this cause is retained for the purpose of entering such order at an appropriate time.

"The costs of this suit are equally divided between the two States, Complainant and Defendant, and this case is retained on the docket for further orders in fulfillment and enforcement of the provisions of this decree."

Honorable Robert P. C. Wilson, III

Thereafter, in 1949, the respective legislatures of both the State of Kansas and the State of Missouri passed legislation providing that, upon the ratification by the Congress of the United States of said legislation, the center of the channel of the Missouri River as its flow extends from its intersection with the Fortieth parallel, north latitude, southward to the middle of the mouth of Kaw or Kansas River, shall be the true permanent boundary line between the states of Missouri and Kansas, and that the State of Missouri shall assume jurisdiction and sovereignty over all land on the Missouri side of the middle of the channel of the Missouri River and, likewise, Kansas shall assume the same authority on its side.

Thereafter, the Congress of the United States enacted what is known as Public Law No. 637, approved August 3, 1950, giving its consent and approval to the foregoing action of the respective legislatures fixing the boundary between the State of Kansas and the State of Missouri. It was necessary that Congress consent to this boundary, as the Constitution of the United States so provides in Article I, Section 10, as follows:

"No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

"No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

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Section 13581, R.S. Mo. 1939, describes the boundary of the County of Platte as fixed by the Legislature, and reads:

"Beginning in the middle of the main channel of the Missouri river, at a point where a prolongation south of the old boundary line of the state would intersect the same; thence north with said boundary line to the line run and marked by Matthew M. Hughes, under an act of the general assembly of 1838 and 1839; thence west with said line to the middle of the main channel of the Missouri river; thence down said river, in the middle of the main channel thereof, to the place of beginning."

Furthermore, under Section 13664, R.S. Mo. 1939, it is provided that whenever a county is bounded by a watercourse it shall be construed to be the main channel thereof. Said section reads:

"Whenever a county is bounded by a watercourse, it shall be construed to be the middle of the main channel thereof; and range, township and sectional lines shall be construed as conforming to the established surveys."

The act of the Legislature referred to in Section 13581, supra, can be found on page 23, Laws of 1838 and 1839, which was an act to organize the counties of Platte and Buchanan and define the boundaries thereof. Section 1 of said act reads:

"The territory west of Clay and Clinton counties, included in the following boundaries shall compose a new county, to be called Platte: Beginning at the southwest corner of Clay county, and running north, with the western boundary of said counties a sufficient distance to a corner hereafter to be established by survey; and thence due west to the Missouri river; thence down the middle of the main channel of said river to the beginning, so as to include in said county of Platte four hundred square miles."

Section 10 of said act reads:

"Immediately after the passage of this act, the Governor (is) authorized and required to appoint some suitable person, as surveyor, to ascertain, survey and establish the boundaries of said counties of Platte and

Honorable Robert P. C. Wilson, III

Buchanan, agreeably to the provisions of this act."

(The foregoing sections were approved December 31, 1838.)

From the foregoing statutes fixing the boundary of the county of Platte it can easily be seen that the Legislature fixed the western boundary of said county as the middle of the main channel of the Missouri River.

From the above judgment and decree there can be little doubt as to how the Missouri River at this particular point and time changed its course. It was not caused by avulsion, but was a gradual change over a period of many years and was almost imperceptible to the eye.

Therefore, under the well-established rule announced in the foregoing decision that when changes in the course of a navigable river, the thread of which is the boundary between states, take place by a slow, gradual process and not a sudden change by avulsion, the boundary moves with a shifting in the main channel's course, but if the change of the channel is brought about by a sudden or avulsion change, the boundary remains as it was prior to the shifting of the channel of the river (see *Kansas vs. Missouri*, 88 L. Ed. 1.c. 1237).

Under the facts shown in the above decision the commissioner appointed by the court, and also the Supreme Court, found that the change in the channel of the Missouri River along the western side of Platte County, Missouri, was caused by a slow and gradual change, and not by avulsion.

Therefore, since the boundary between the State of Missouri and State of Kansas along Platte County was formerly the middle of the channel of the Missouri River, and likewise it was the western boundary of Platte County, Missouri, then the present boundary between the states of Kansas and Missouri still remains the middle of the channel of the Missouri River, and likewise the middle channel of the said river remains the western boundary of Platte County, Missouri. So all that area formed by the change in said channel along Platte County, Missouri, automatically comprises a part of said County of Platte. Also, under the foregoing acts of the respective state legislatures, and with the consent of the Congress of the United States, which was necessary, the boundary line along Platte County, Missouri, between said states remains as the middle of the present channel.

Therefore, in view of the foregoing, it is the opinion of this department that the County Court of Platte County has the

Honorable Robert P. C. Wilson, III

same authority and duty to build and maintain roads on said new area, now a part of Platte County, caused by a change in the course of the Missouri River, as said court does over any other part of said county.

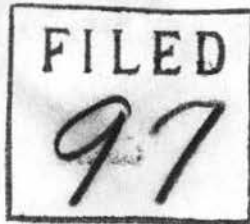
Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

STATE INHERITANCE TAXES: Inheritance taxes to be paid by admin-
PAID TO WHOM: istrator to Director of Revenue less
: 2½% to be paid to probate judge as fees.
: Judge to account and pay over such fees
: to Director of Revenue.



December 22, 1950

1-2-51

Honorable Bryan A. Williams
Probate Judge and Ex-Officio Magistrate
Bollinger County
Marble Hill, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which request reads as follows:

"I would appreciate an opinion with regard to the following question:

"Are all inheritance taxes due in an estate payable direct to the State Treasurer, or is 2½% of the same collected by the Probate Judge and accounted for on his monthly report of fees collected and payable to State Collector of Revenue?"

Under the provisions of Section 580, page 68, Laws of Missouri, 1945, it is the duty of the executor, administrator, or trustee to pay inheritance taxes due from funds of the estate within thirty days from the date said funds shall have come into his possession, except two and one-half percent of such taxes, which shall be paid to the probate judge as his fees. Said section reads as follows:

"Every sum of money retained by any executor, administrator, or trustee or paid into his hands for any taxes on any property or

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derived from any source whatever for the payment of any such taxes shall be paid by him within thirty days thereafter to the Director of Revenue except two and one-half per cent of such tax which he shall pay to the probate judge as fees, and which fees shall be deposited by the probate judge as provided by law. Upon the payment to the Director of Revenue of any taxes due under this law, such Director of Revenue shall issue a receipt therefor in triplicate, one copy of which he shall deliver to the person paying said tax. Said Director of Revenue shall retain one of said receipts and the other he shall countersign and immediately transmit to the clerk of the court fixing such tax and no executor, administrator, or trustee shall be entitled to credit in his account or be discharged from liability from said tax, nor shall such estate be distributed or closed unless a receipt issued by the Director of Revenue shall have been filed with the court."

Section 13404, page 356, Volume II, Laws of Missouri, 1947, provides each fee that may be charged against and collected from the estates or parties requiring the services of the probate judge, clerk or court. Since we are concerned here with the fees of the probate court in connection with collection of state inheritance taxes, only that part of the section relating to this subject will be quoted, as follows:

"* * * * *

"For supervising all estates in each court and having appraised such of said estates as may be liable for taxes under the state inheritance tax law, in addition to the fees applicable as hereinbefore provided, a fee of two and one-half per cent of all such inheritance taxes finally assessed and paid on property assessed through the respective courts shall be charged, the same to be collected by

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said judges from the person whose duty it is to pay such tax: Provided, in all estates in which the state treasurer (director of revenue) or the executor, administrator or trustee in charge thereof, shall be required under the provisions of the inheritance tax law to refund to the person entitled thereto any inheritance tax collected by them, the state or county receiving same shall refund to the person entitled thereto out of the two and one-half per cent fee on such tax the proportional part thereof to which any such person may be entitled to a refund.

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall be imposed on the clerk of the probate court.

"In counties now or hereafter having 30,000 inhabitants or less, the judge or clerk of the court shall, at the end of each month, file with the director of revenue a written report, verified by his affidavit specifying the name and court number of each estate in which fees were paid during such month and at the same time pay over to the director of revenue, to be deposited by him with the state treasurer in the 'magistrate fund,' all moneys collected by him or his clerk as fees, taking two receipts therefor, one of which he shall immediately file with the state treasurer. Each judge or clerk of the court shall, within thirty days after the expiration of calendar year file with such director of revenue a written report, verified by his affidavit specifying the name

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and court number of each estate in which fees accrued in his court in such calendar year, and the amount of fees unpaid and due in each estate at the end of such year. Such judge or clerk of the court shall also specify in said written report to the director of revenue all fees which have been due and unpaid for more than one year, the amounts thereof and the name of the estate in which the same are due, which report shall be verified by affidavit of the judge or clerk of the court that he has been unable after the exercise of diligence, to collect the same; and it shall thereupon be the duty of the director of revenue to cause the same to be collected by law and turned over to the state treasurer."

It is our thought that under the provisions of the above cited statutes it is the duty of the executor or administrator of the Estate of W. L. Tinnin, deceased, to pay the amount of inheritance taxes found to be due, from funds of the estate within thirty days of the receipt of said funds by said executor or administrator. That such payment of taxes shall be made to the Director of Revenue of Missouri, except two and one-half percent of such taxes which shall be paid to the Probate Judge of Bollinger County as his fees for the supervision and appraisement of the estate for inheritance tax purposes.

Upon receipt of said amount, it becomes the duty of the probate judge to promptly pay over such fees to the State Director of Revenue, and to account for his fees, by making the written report required by the above section, last cited.

CONCLUSION.

It is the opinion of this department that inheritance taxes due from an estate shall be paid by

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the executor or administrator thereof from any estate funds received or retained by him for the payment of taxes, within thirty days of the receipt or retention of such funds. That such taxes shall be paid to the Director of Revenue of Missouri, less two and one-half percent of same, which amount shall be paid as fees to the probate judge of the county where said estate is being administered.

It is the further opinion of this department that upon receipt of fees amounting to two and one-half percent of inheritance taxes paid on the estate, from the executor or administrator thereof. That a probate judge of a county now having or which may hereafter have a population of 30,000 or less, and in whose court the estate is being administered, pay over said fees and any others that he may have received in his official capacity to the Director of Revenue of Missouri, and to account for all such fees so received within the time and manner provided by Section 13404, page 358, Volume II, Laws of Missouri, 1947.

Respectfully submitted,

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APPROVED:



J. E. TAYLOR
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